

“Merchants of Discontent”:[†] An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech

Tamara R. Piety*

A really efficient totalitarian state would be one in which
the all-powerful executive of political bosses and their
army of managers control a population of slaves who do
not have to be coerced, because they love their servitude.¹

TABLE OF CONTENTS

INTRODUCTION	379
I. OVERVIEW OF COMMERCIAL SPEECH DOCTRINE	382
A. Where’s the Harm?	382
B. The Development of Commercial Speech Doctrine	388
C. “Puffing”: Advertising Manipulation as Trivial and Inconsequential	394
II. THE FIRST AMENDMENT, AUTONOMY, RATIONALITY, AND PATERNALISM	396
A. Visions of Autonomy	398
B. Autonomy and Rationality: The Importance of Be- ing Rational	400

† VANCE PACKARD, *THE HIDDEN PERSUADERS* 22 (1957). Packard noted, “An ad executive from Milwaukee related in *Printer’s Ink* that America was growing great by the *systematic creation of dissatisfaction*.” *Id.* at 255 (emphasis added).

* J.D., 1991, University of Miami; LL.M., 2000, Harvard Law School; Teaching Fellow, 2000–2001, Stanford Law School; Visiting Assistant Professor, University of Tulsa College of Law. I would like to thank Jon Hanson, Duncan Kennedy, Richard Craswell, Marietta Auer, Amalia Amaya Navarro, Jeff Roy, Reginald Oh, Ed Lee, and Jeanne Merino for reading this manuscript at various stages and giving me their thoughtful comments. Any shortcomings remaining are entirely my own. Thanks to the faculty at University of Missouri-Columbia, where I first presented this piece and got helpful feedback. Finally, special thanks to Jon Hanson, Nancy Rapoport, Jean Sternlight, and Marietta Auer for offering moral support at critical junctures.

1. ALDOUS HUXLEY, *BRAVE NEW WORLD* xvi (Harper & Row 1946) (1932). It is perhaps no accident that this excerpt uses language that is as descriptive of corporations as of government.

C.	Behavioral Research and "Normal" Rationality	401
D.	Rationality and Autonomy as Normative Constructs	405
III.	THE PSYCHOLOGY OF ADVERTISING	407
A.	Advertising and Denial	407
B.	How Advertising Works: Brands and Bonding—Or Buying a "Relationship"	409
C.	"Follow the Yellow Brick Road": Consumption and the Illusion of Control	411
D.	I Can't Get No Satisfaction—The Insatiable Need for Love, Power, and Prestige	412
E.	Fear as a Selling Tool	413
F.	The "Quick Fix"	416
G.	Numbing Down	417
H.	Consumption: The "Wasting Disease"	418
I.	"Laying Waste Our Powers"	421
IV.	HARMS AND ADVERTISING: THE PARALLEL BETWEEN ADVERTISING AND ADDICTION	422
A.	What is Addiction?	422
B.	Addiction: The Internal View	425
C.	Bonding—Addiction as a Relationship	426
D.	Beam Me Up, Scotty!—Fantasy, Escapism, and Magical Thinking	428
E.	Denial and Deception—Ask Me No Questions and I Will Tell You No Lies	429
F.	"I Just Want to Be Alone"—Isolation and Addic- tion	429
G.	Numbing Down—Redux	431
H.	Summary of Parallels Between Addiction and Ad- vertising Psychology	432
V.	COMMERCIAL ADVERTISING AND SOCIAL HARMS ...	434
A.	The Special Case of Addictive Substances	435
B.	History and Drug Companies: Patent Medicine Pushers	438
C.	Advertising and Children	439
D.	Mirror, Mirror on the Wall, Who's the Fairest of Us All?—Women, Advertising, and the Frustration of the Promise of Equality	446
	CONCLUSION	449

INTRODUCTION

In 1931, Aldous Huxley drew a portrait of a disturbing future totalitarian state that achieved its aims of dominance via social and genetic conditioning, and that rendered overt coercion virtually superfluous because those controlled “love[d] their servitude.”² At the time he wrote it, Huxley thought dangers of the sort described in *Brave New World* “were coming all right, but not in my time, not even in the time of my grandchildren.”³ “Twenty seven years later,” he wrote, “I feel a good deal less optimistic The prophecies made in 1931 are coming true much sooner than I thought they would.”⁴ One of the sources for Huxley’s increased pessimism in 1958 was the growth of what he called “commercial propaganda.”⁵ Although Huxley thought “[u]nder a free enterprise system commercial propaganda by any and every means [was] absolutely indispensable,”⁶ he feared it was not necessarily compatible in the long run with democracy.⁷ “The methods now being used to merchandise the political candidate as though he were a deodorant positively guarantee the electorate against ever hearing the truth about anything.”⁸

Huxley’s vision in *Brave New World* involved a marriage of business and politics, a regime dedicated to the teachings of Ford and Freud⁹ in which consumption and social stability were the overriding goals.¹⁰ Citizens were indoctrinated into accepting and *internalizing* those overriding goals through a variety of techniques—sleep teaching, genetic engineering, and the availability of widespread drug use and escapist fantasies (“feelies”). That picture does not seem radically different from the society in which we currently live, a society in which we are bombarded daily by advertising and in which the distinctions

2. *Id.* This vision keeps cropping up, perhaps most recently in the movie *The Matrix*, in which people are given the option of taking either a red pill or a blue pill, the blue pill maintaining in the user the “comfortable slavery” that illusion is reality. See Ella Taylor, *Cyberreality Bites: Boys, Toys and Girl Trouble in 1999’s Top Ten*, THE NATION, Apr. 3, 2000, at 30 (reviewing, inter alia, THE MATRIX (Warner Bros. 1999)). Query, too, whether this vision does not have something in common with Robert Nozick’s “experience machine.” See ROBERT NOZICK, THE EXAMINED LIFE 104–05 (1989).

3. ALDOUS HUXLEY, BRAVE NEW WORLD REVISITED 1 (First Perennial Library 1965) (Harper & Row 1958).

4. *Id.* at 2.

5. *Id.* at 56.

6. *Id.* As noted below, this is a sentiment that the Supreme Court has shared. See *infra* note 80 and accompanying text.

7. *Id.* at 57–67.

8. *Id.* at 67.

9. HUXLEY, *supra* note 1, at 39.

10. *Id.* at 43–50. The events of September 11, 2001 and their aftermath have unmistakably exposed the degree to which the American economy is dependent upon consumption.

between information and promotion, advertising and editorial content, and government and private enterprise seem increasingly blurred. From the perspective of the new century, it is difficult not to conclude that the dangers envisioned by Huxley are real and that it may be of only limited significance that this ethos is not promoted directly by the government itself.

That would seem to be cause for alarm not only because Huxley's vision was meant to be dystopian, not utopian, but also because, in the here and now, there is concern that commercial advertising may be having deleterious effects on psychological well-being.¹¹ Nevertheless, the "cure" for this state of affairs *appears* equally alarming to many if that cure is increased government regulation of commercial speech. This is because regulation of speech implicates the First Amendment, which is often thought to stand as a bar to such regulation.¹²

Moreover, increasing regulation of commercial speech would represent a reversal of the current trend to offer *more* protection for commercial speech rather than less.¹³ If commercial speech is analogized to the traditional areas of speech protected by the First Amendment, the suggestion of governmental regulation of commercial speech is often received as an invitation to totalitarianism. As First Amendment scholars Ronald Collins and David Skover have pointed out, the thrust of First Amendment jurisprudence and theory has been rather more preoccupied with avoiding the dangers of a totalitarian regime such as that envisioned by George Orwell in 1984¹⁴ than in recognizing the aspects of the "Huxleyan nightmare"¹⁵ in which we currently live.

11. The common failure to recognize advertising as transmitting a particular ethos may have some parallels with our general, albeit not universal, failure to view our educational system as transmitting an ethos of secular humanism. See Naomi Stolzenberg, *He Drew a Circle That Shut Me Out*, 106 HARV. L. REV. 582 (1993).

12. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

13. Originally, commercial speech was not considered "speech" for purposes of the First Amendment. See *infra* notes 55–71 and accompanying text. For arguments that the First Amendment should protect more commercial speech, see Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990); Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437 (1980); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

14. GEORGE ORWELL, 1984 (1948).

15. Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1090–91 (1990). I am much indebted to Collins and Skover not only

Must we conclude, then, that the First Amendment renders the government powerless to protect citizens from harm? If the answer to that question is "No," then the availability of protection may depend upon a showing of harm. That is the object of this paper. So, unlike Collins and Skover's characterization of their project as "more descriptive than normative,"¹⁶ this work aspires to be both descriptive and normative because I propose that commercial advertising is often harmful. Although its defenders often say that advertising is merely reflecting us back to ourselves and giving us what we want, I suggest that it does not really give us the intangible goods (love, community, self-esteem, friendship, etc.) that it uses to sell us tangible, material ones.¹⁷ Rather, it offers us commodities as surrogates for many of those intangible goods. Ironically, in so doing, advertising may thereby assist in pushing these intangible goods further from our reach by encouraging an addict mentality.

In this paper, I attempt to draw parallels between the psychology of commercial advertising and marketing and the psychology of addiction. Both appear to be characterized by denial, escapism, narcissism, isolation, insatiability, impatience, and diminished sensitivity. Advertising appeals to these impulses and addiction is marked by them. In what follows, I explore these parallels in general and then explore the potential consequences or side effects in three specific contexts: the advertising of addictive products, advertising and children, and advertising and women.

In these three areas, there is some evidence that advertising may be contributing to negative social phenomena in a non-trivial way—perhaps because of the addict mentality to which advertising may contribute. That contribution suggests that the basis for extending First Amendment protection to commercial advertising ought to be reexamined. However, in order to defend this assertion and capture the harm that may be caused by advertising, it is necessary to step back, look critically at, and describe the existing environment, as well as some of the roadblocks that stand in the way of such a reexamination.

for the term "Huxleyan nightmare," but also for framing the problem of the First Amendment and commercial speech as one involving the contrasting visions of Orwell and Huxley. As will be seen below, this framing has contributed immeasurably to this work. See also RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* (1996) [hereinafter COLLINS & SKOVER, *DEATH OF DISCOURSE*].

16. COLLINS & SKOVER, *DEATH OF DISCOURSE*, *supra* note 15, at 130.

17. "[N]o form of communication is more sensitive to the wishes and whims of hearers [than commercial advertising]." BURT NEUBORNE, *FREE SPEECH—FREE MARKETS—FREE CHOICE: AN ESSAY ON COMMERCIAL SPEECH* 13 (1987) (publication of the Association of National Advertisers).

I. OVERVIEW OF COMMERCIAL SPEECH¹⁸ DOCTRINEA. *Where's The Harm?*

Since the business of the market is often treated as if it reflected the "natural" state of affairs,¹⁹ many consumers apparently do not view the commercial advertising with which we are bombarded as a form of indoctrination into a particular ethos. Instead, commercial advertising is viewed as sometimes annoying, sometimes "tactless and excessive,"²⁰ and sometimes amusing and entertaining,²¹ but essentially unavoidable.²² More importantly, it is almost always viewed as benign and harmless,²³ a view that is quite curious. After all, the very *pervasiveness* of commercial advertising²⁴ and its apparently "indispensable"²⁵ role in the market economy would appear to confirm that it has some effect on us. If it did not have some effect on us, advertising could hardly be "indispensable." Thus, an asymmetry emerges: advertising is deemed effective for promoting sales, but ineffective or trivial as a factor in promoting harmful behavior or attitudes.

18. To some extent, this discussion is unduly limited since commercial speech also arguably includes speech by corporations on public issues. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). I do not cover this topic here. However, the alert reader may note that many of the objections that I raise here to commercial advertising, in particular the resulting slant in the public discourse, may also be made in this area.

19. See, e.g., Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U.L. REV. 939 (1985) (arguing that classical and neoclassical economics set up a concept of "the market" and proceeded to naturalize it, that is, to treat it as if it were the natural state of affairs against which all government regulation must be tested).

20. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

21. See, e.g., Mark V. Tushnet, *Decoding Television (and Law Reviews)*, 68 TEX. L. REV. 1179 (1990).

22. Martin H. Redish, *Killing the First Amendment with Kindness: A Troubled Reaction to Collins and Skover*, 68 TEX. L. REV. 1147, 1148 (1990).

23. See, e.g., Smolla, *supra* note 13, at 802 ("What harm to the consumer does this fantasizing do? Who is hurt?"). Ironically, this question is posed in the context of ads for Nike basketball shoes. Kids have been known to kill one another for their athletic shoes. See Ronald K.L. Collins & Michael F. Jacobson, *Commercialism Versus Culture*, CHRISTIAN SCIENCE MONITOR, Sept. 19, 1990, at 19 ("The tragic end-product of this is kids killing kids in Baltimore and elsewhere in order to walk in their playmates' \$100 name-brand sneakers.").

24. See, e.g., LEO BOGART, *COMMERCIAL CULTURE* (1995).

Advertising occupies about a fourth of the roughly 25 hours the average person spends weekly with television and nearly a fifth of the 20 hours spent with radio. And advertising fills three-fifths of the space in newspapers and over half of the pages in magazines. Other forms of commercial intrusion include point-of-sale promotion and direct marketing by telephone or mail.

Id. at 72. This description misses a great deal of advertising that takes place in the form of corporate sponsorship of sporting and cultural events, corporate names on sports stadiums, product placement in movies, and so forth.

25. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

This asymmetry has, I believe, a psychological explanation. Commentators often deny claims that advertising is harmful because such claims represent an assault on our cherished self-image as rational actors.²⁶ It is simply offensive to our dignity, at least to many of us anyway, that we can be manipulated with such transparent appeals to our emotions or with obviously irrelevant data. This attitude with respect to advertising is evident outside the First Amendment in the “puffing” defense to breach of contract claims.

The puffing defense²⁷ is premised on the notion that no rational person will, nor ought to, believe superlative or outlandish claims.²⁸ As a consequence, such claims will not form the basis of a contract that is breached when the maker of the statements fails to deliver on them. Implicit in this rule is that “rational” persons are the norm, or ought to be.²⁹ Similarly, the Supreme Court’s commercial speech jurisprudence reflects the assumption that the rational consumer, as the Court conceives of “rational,” is the norm. Thus, the Court has declared that protection for commercial speech “is based on the informational function of advertising.”³⁰ In the Court’s view, more information results in more rational decisions in the aggregate.³¹

However, based on what we know about the fallibility of human rationality along certain lines, for example, the cognitive biases that are discussed in more detail below, the notions that advertising is inconsequential or that most people are rational in the way the Supreme Court appears to assume they are, specifically, that they are able to sort out information from indoctrination, appear unfounded. Indeed, to assert that human beings are rational in this sense looks a lot like denial.³²

26. See, e.g., JULIET SCHOR, *DO AMERICANS SHOP TOO MUCH?* 15–23 (2000) (criticizing conventional economists’ construction as “rational” actors in the sense of purposive and deliberating as inconsistent with the evidence).

27. See *infra* notes 91–96, and accompanying text.

28. *Id.*

29. The question of whether rational consumers are in fact the norm or whether they simply *should* be is the question that poses the distinction between descriptive versus normative. In this essay, I propose that the assumption is more normative than descriptive. See *infra* notes 157–63 and accompanying text. I say it is implicit that such rational consumers must either be assumed to represent the majority or that the rule is a statement that they ought to represent the norm because I assume that it would violate common understandings about fairness if one or the other were not the basis for the rule.

30. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 563 (1980). Presumably, the rational consumer is expected to filter out puffing claims.

31. *Id.*

32. “Denial” is the psychological process in which the addict denies the manifestations of his addiction so as to be able to continue it. Interestingly enough, although the literature on addiction is replete with references to the phenomenon of denial, it is difficult to find a definition of it. This is the closest I have come: “[D]enial consists of the delusion of control, with the indi-

However, the common response to objections to commercial advertising or suggestions for stricter regulation, is that the regulation of advertising will start us on a "slippery slope" that ends in totalitarianism.³³ In addition, defenders of advertising often claim that the desire to regulate advertising represents an attempt to impose an elite sensibility on the public, an esthetic of the intelligentsia that denigrates pop culture.³⁴ This "cure," these critics say, is worse than the "disease" because they are not sure that there is anything wrong with the current advertising environment.³⁵

As noted above, many dismiss the efficacy of commercial advertising and ask, "Where's the harm?"³⁶ Moreover, proponents of unrestricted commercial speech often argue that advertising promotes economic efficiency in the market by offering consumers the widest possible information on available products.³⁷ On the other hand, free speech is characterized as a sacred and inviolable right that we en-

vidual obstinately insisting that he is really in control of the alcohol or cocaine and of his life in general." ABRAHAM J. TWERSKI, M.D., *SUBSTANCE-ABUSING HIGH ACHIEVERS: ADDICTION AS AN EQUAL OPPORTUNITY DESTROYER 2* (1998).

This definition, indeed the very existence of a phenomenon of "denial," is not uncontroversial. See STANTON PEELE, *DISEASING OF AMERICA* 79-80 (1989) (describing denial as a catch-22 in which the denial of addiction itself becomes one of the proofs of its existence). Perhaps, the reluctance to offer a definition stems in part from the problem of distinguishing denial from simply lying. People in the industry emphatically reject the idea that denial is just lying by another name. Rather, denial appears to involve primarily self-deception, a half-conscious thrusting away of the glimmerings on the horizons of consciousness of a disturbing fact. It could be that denial is effectively the same phenomenon described as "cognitive dissonance" by behavioralists. See Jon D. Hanson & Douglas A. Kysar, *Taking Behaviorism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 658 (1999) (citing Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems*, 5 J. BEHAV. MED. 441, 456-57 (1982) (cognitive dissonance is "the tendency to reject or downplay information that contradicts other, more favorable views about oneself.")). Whatever its exact properties, denial has become such a familiar concept in the culture that it regularly appears outside psychology literature. See, e.g., Gary Minda, *Denial: Not Just a River in Egypt*, 22 CARDOZO L. REV. 901 (2001); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 192-94 (1998) (discussing denial in adjudication).

33. See, e.g., Leo Bogart, *Freedom to Know or Freedom to Say?*, 71 TEX. L. REV. 815 (1993); Redish, *supra* note 22.

34. See, e.g., Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 749 n.6 (1993) (comparing Collins and Skover to "an entire curmudgeonly school of criticism of popular culture" which they claim includes Alan Bloom's infamous *THE CLOSING OF THE AMERICAN MIND* (1987)). See also James Twitchell, *The Stone Age*, in SCHOR, *supra* note 26 ("[W]hat these academic economists have trouble with is not consumption but taste."). See also JAMES TWITCHELL, *ADULT USA* (1996).

35. Michael Gartner, *Commercial Speech and the First Amendment*, 56 U. CIN. L. REV. 1173, 1178-79 (1988) (arguing that regulating commercial speech is censorship, and that censorship is dangerous because it is likely to spread to areas that strike at the heart of the First Amendment).

36. See Smolla, *supra* note 13, at 802-03.

37. See Neuborne, *supra* note 13, at 448-53.

croach upon at our own peril. In contrast to these benefits, regulation is said to be of dubious value.

Of course, this argument treats the status quo prior to regulation

as a neutral, natural, and unproblematic background against which government regulation is to be judged. But it is assumed that freedom of the status quo.³⁸ However, one could argue that free speech in a situation of radically unequal economic power is not free speech at all because it is skewed by the preexisting distribution of property and, one might add, distribution of access to media. As Professors Balkin and Sunstein have suggested, the attempts by radical scholars to rethink First Amendment doctrine in the areas of pornography and hate speech⁴¹ "all involve techniques first used by the legal realists to deconstruct the ideology of the sacred freedom of contract. The only difference is that now the attack, the assault on the citadel if you will, is directed at the sacred right of free speech."⁴² Not surprisingly then, the defenses of the "sacred right of free speech"⁴³ also bear more than a passing resemblance to those offered in defense of freedom of contract.

However, this relatively new interpretation of the First Amendment is not limited to offering defenses against new regulation. Instead, free speech appears as a weapon to wield against existing legislation previously thought to be unproblematic,⁴⁴ as well as a defense against new attempts at regulation. Additionally, many of those who would describe themselves as progressive are so accustomed to reflexively defending freedom of speech that, for this group too, regulation of speech is often viewed as inherently undesirable. In this environment, few Realist-like attacks have been targeted at commercial adver-

38. "Animated by distrust of government, negative libertarians too often embrace the status quo as neutral and natural. In so doing, they fail to come to grips with the government's responsibility for defining private rights." Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 883 (1994).

39. Cf. Kennedy, *supra* note 19.

40. J.M. Balkin, *Frontiers of Legal Thought II. The New First Amendment: Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 379 (1990).

41. See, e.g., Catherine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

42. Balkin, *supra* note 40, at 379-80. See also Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

43. Balkin, *supra* note 40, at 379-80.

44. See, e.g., Aleta G. Estreicher, *Securities Regulation and The First Amendment*, 24 GA. L. REV. 223 (1990) (arguing that current First Amendment doctrine regarding commercial speech cannot be reconciled with all of the Securities and Exchange Commission's regulations restricting advertising of securities and urging deregulation of some speech related to securities).

tising in either the legal literature or the courts.⁴⁵ Thus, at the moment, governmental attempts to regulate commercial speech may often not survive a First Amendment challenge.

Yet, commercial advertising arguably contributes to many social ills. Advertisers are trying to sell a specific product or service in the market and have a powerful incentive to attempt to create as widespread a consensus as possible on the meaning of the ad, namely, "buy our product!" In the process, they simultaneously sell the idea that human happiness is achieved through the acquisition of goods. "I buy therefore I am"⁴⁶ to paraphrase Descartes' famous maxim. Also, the reverse may be taken as true as well: "I am what I buy" or "I am what I can afford to buy."

Whatever the moral and practical shortcomings of a materialist ethic, advertising also arguably contributes to a variety of specific social ills. Among some of those noted by various commentators are the objectification of women,⁴⁷ the promotion of potentially harmful prod-

45. There are some exceptions, most notably in the area of advertising for addictive products. See, e.g., Donald W. Garner & Richard J. Whitney, *Protecting Children From Joe Camel and His Friends: New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479 (1997); Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909 (1992); Daniel Hays Lowenstein, *Commercial Speech and the First Amendment: "Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988).

In a category all by themselves are Ronald K.L. Collins and David M. Skover, whose remarkable tour de force in a series of articles provided a substantial part of the support for this essay. See Ronald K.L. Collins & David M. Skover, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783 (1993); Ronald K.L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697 (1993); Ronald K.L. Collins & David M. Skover, *The Psychology of First Amendment Scholarship: A Reply*, 71 TEX. L. REV. 819 (1993); Collins & Skover, *supra* note 15, at 1092; Ronald K. L. Collins & David M. Skover, *The First Amendment in Bold Relief: A Reply*, 68 TEX. L. REV. 1185 (1990). See also, COLLINS & SKOVER, *DEATH OF DISCOURSE*, *supra* note 15. Similar arguments regarding the influence of advertising on consumer decision-making processes have been made in the area of products liability. See, e.g., Note, *Harnessing Madison Avenue: Advertising and Products Liability Theory*, 107 HARV. L. REV. 895, 895-96 (1994) (remarking that the absence of discussion in products liability scholarship of the influence of advertising on consumer behavior makes it something of a cipher). Again, in a category by themselves are Professors Hanson and Kysar whose *Taking Behavioralism Seriously* series, *supra* note 32, is explored in greater detail below. See *infra* notes 142-56 and accompanying text.

46. Collins and Skover also use this reformulation. See COLLINS & SKOVER, *DEATH OF DISCOURSE*, *supra* note 15, at 88. A similar parallel of thought occurs with the quote to Calvin Coolidge, which appears at the end of this article. Compare Coolidge, *infra* note 406 and accompanying text with COLLINS & SKOVER, *DEATH OF DISCOURSE*, *supra* note 15, at 112. Whether I thought of either before I read them in Collins and Skover, I could not say for sure. I am tempted to think that this is an example of the old aphorism of "great minds think alike," however immodest this construction (is not everyone "great" who shares some of our views?). Alas, it may just be the optimistic bias at work. See *infra* note 154 and accompanying text.

47. JEAN KILBOURNE, *DEADLY PERSUASION* (1999).

products such as alcohol and tobacco,⁴⁸ the degradation of public spaces (particularly urban neighborhoods),⁴⁹ the co-opting of content in publications based on advertiser interests,⁵⁰ speculation in the stock market,⁵¹ and perhaps others. These harms suggest that free speech may not be as "free" as we like to think.

In what follows, I explore some of these harms and suggest another. I want to answer the question, "Where's the harm?" by analogizing the psychology of commercial advertising to the process of addiction. Commercial advertisers are in the business of desire creation, that is, creating desire for a product or service as a token or visible symbol for common human desires such as love, self-esteem, status, happiness, and freedom. The problem is, these desires cannot be completely satisfied, if at all, by a product. Rather, advertising sets up a vicious cycle wherein the consumer continues to buy in the hope that the next acquisition or experience will deliver the promised feeling. Of course, such parallels cannot be definitively proven.⁵² The ideas I discuss here are just ideas and are meant to offer an impressionistic portrait, the details of which may or may not be able to be filled in with more work, research, and empirical studies. Nevertheless, in what follows, I discuss the psychological appeals made by advertising and the mindset that characterizes addiction. It is left to the reader to decide whether the analogy is an apt one.

In presenting these ideas, I do not attempt to argue that the current situation with respect to materialism or pleasure seeking is any different than it has been in other historical periods.⁵³ However, "[r]omanticizing the past is one thing; romanticizing the present is . . .

48. *Id.*; RICHARD KLUGER, *ASHES TO ASHES* (1996).

49. KALLE LASN, *CULTURE JAM: THE UNCOOLING OF AMERICA*TM (1999).

50. *Id.* See also Eric Efron, *No More Virgins*, *BRILL'S CONTENT*, Feb. 2000, at 45 (describing the flap over the Los Angeles Times' arrangement with a major advertiser to do a special issue promoting its Staples Center sports complex). The deal was widely criticized as a breach of journalism ethics requiring a separation between editorial and advertising ends of the paper. Efron's essay claims that such breaches occur regularly.

51. See Marcia Vickers & Gary Weiss, *The Wall Street Hype Machine*, *BUS. WK.*, Apr. 3, 2000, at 168 (arguing that a series of "polite fictions," sponsored by media hype including advertising, "must be pierced" in order to avoid a culture of market gambling). This issue carried a cover story on the same phenomenon. See *id.* at 113.

52. There is no agreement on what addiction is, let alone on what causes it. See *supra* note 32. Similarly, the empirical connection between media, including advertising, and behavior has not been definitively made and probably cannot be made to the extent that no control group, free of immersion in the advertising culture, can be found.

53. I believe that it is. However, I doubt that it could be demonstrated empirically. Still, it seems that never in history have both the means and the leisure to engage in such behavior been so widespread. For an illustration of the dangers of nostalgia, see STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992).

another."⁵⁴ This is an effort to deromanticize the present discussion about the First Amendment. Hopefully, the impressionistic portrait that I present is disturbing and may tell us important things about both the values we exercise and the choices we make every day, not only in the law, but also in our personal lives, in continuing to treat commercial advertising as largely harmless.

B. The Development of the Commercial Speech Doctrine

During the first approximately two hundred years of the United States' existence, commercial speech was not considered covered nor protected by the First Amendment.⁵⁵ Thus, in 1942, it appeared clear to the Supreme Court that, while the government was restrained by the First Amendment from burdening "the freedom of communicating information and disseminating opinion,"⁵⁶ the Constitution imposed "no such restraint on government as respects purely commercial advertising."⁵⁷ Today, this construction begs the question because commercial advertising itself often "communicates information." In fact, it was primarily on this basis, the supposed communication of information, that protection for commercial speech was extended some thirty years later.

In *Bigelow v. Virginia*⁵⁸ the Supreme Court was presented with a petition involving a state-wide criminal prohibition on advertising the availability of abortion services. In that case, an advertiser placed ads both announcing that abortions were legal in New York and offering the advertiser's referral service there.⁵⁹ The Court reversed the conviction of the editor of the newspaper carrying the ad⁶⁰ and noted that the Virginia courts had "erred in their assumptions that advertising, as

54. COLLINS & SKOVER, DEATH OF DISCOURSE, *supra* note 15, at 128.

55. Since First Amendment protection for commercial speech is a development of only the last quarter of this past century, it might be fair to say that the implications of this change in course have not yet been fully felt or realized. See, e.g., Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1183-84 (1988) (noting that the area of potential commercial speech is "far wider" than generally assumed); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1213-14 (1983) (same).

56. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (rejecting commercial speech as unprotected by the First Amendment).

57. *Id.*

58. 421 U.S. 809 (1975).

59. *Id.* at 811.

60. Notice that here, like in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the publisher is treated as the speaker of the speech of the advertiser. While it may be that there are sound reasons for treating them as identical for purposes of the First Amendment (not to mention for purposes of tort law), it may be worth pondering whether their interests in the content are identical.

such, was entitled to no First Amendment protection."⁶¹ However, because of the intersection between the issues presented and the recently decided *Roe v. Wade*,⁶² it was possible to distinguish *Bigelow* from other advertising cases, as it implicated another constitutional right and/or involved a matter of public concern. Thus, it was unclear whether or not the Court's holding was meant to establish a new realm of protected speech. The Court dispelled any such uncertainty in the next term in *Virginia State Board of Pharmacy v. Virginia Citizens Council*.⁶³

In the *Virginia Pharmacy* case, the Court was confronted with a state's regulatory control of price advertising for prescription drugs.⁶⁴ The Virginia Board of Pharmacy prohibited price advertising on the theory that price advertising would launch price competition that would in turn ultimately result in a decline in professionalism and in the elimination from the market of small pharmacies.⁶⁵ In response, the Citizens Council argued that the suppression of price information hurt consumers since they would not be able to conveniently discover where prescriptions might be filled at the lowest price.⁶⁶

Here, the Court found that the issue of First Amendment protection for commercial speech was squarely presented.⁶⁷ In concluding that commercial speech fell within the ambit of the First Amendment's protection, the Court noted that speech "does not lose its First Amendment protection because money is spent to project it."⁶⁸ However, in so holding, the Court relied not on the speakers' right to speak, but on the listeners' right to hear:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. *It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.* To this end, the free flow of commercial information is indispensable . . . [E]ven if the First

61. *Bigelow*, 421 U.S. at 825.

62. *Roe v. Wade*, 410 U.S. 113 (1973).

63. *Va. State Bd. of Pharmacy v. Va. Citizens Council*, 425 U.S. 748 (1976).

64. *Id.* at 749–50.

65. *Id.* at 767–70. Virginia's argument, while somewhat strained insofar as it relied on a number of shaky empirical predictions, was not by any means incredible or counterintuitive.

66. *Id.* at 753–54, 763–64.

67. *Id.* at 760–61.

68. *Id.* at 761. Of course, as the Court noted, this is also probably true of much speech that is not advertising.

Amendment were thought to be primarily an instrument to enlighten the public decision making in a democracy, we could not say that the free flow of information does not serve that goal.⁶⁹

In fact, the Court opined, it was possible that “the particular consumer’s interest in the free flow of *commercial* information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”⁷⁰ Nevertheless, the Court did not conclude that the government was unable to regulate commercial advertising. It maintained that the government was free to regulate commercial speech so as to prevent advertising that was false or deceptive.⁷¹

While this limitation sounds comforting, today⁷² it is largely illusory. Saying that the government may regulate advertising that is false or misleading is problematic since much of commercial advertising cannot be tested for its “truth” *per se*. Because much advertising is calculated to appeal to emotions and prerational⁷³ thought processes, it is often image-based, relying on the visual, symbolic linking of the product to pictures and symbols.⁷⁴ Just as it is impossible to come up with a definitive explanation of “the message” of a work of art, it is also impossible to come up with a definitive explanation of an advertisement that relies largely on pictures, symbols, and music over an explicit verbal message. Trying to test such advertising for its “truth” seems virtually hopeless.⁷⁵

69. *Id.* at 765 (emphasis added).

70. *Id.* at 763 (emphasis added).

71. *Id.* at 771 n.24; *id.* at 776–81 (Stevens, J., concurring).

72. In the early days of advertising, advertisers relied heavily on “reason why” advertising, that is, advertising intended to sell the consumer on the reason why she should use the product. See COLLINS & SKOVER, *DEATH OF DISCOURSE*, *supra* note 15, at 72–73. Today, such advertising is much less prominent although it has by no means disappeared.

73. “Rational” is a term that is itself problematic as is discussed in more detail *infra* notes 125–161 and accompanying text.

74. See, e.g., *Special Report Brands*, THE ECONOMIST, Sept. 8, 2001, at 27 (“The new marketing approach is to build a brand, not a product—to sell a lifestyle or a personality, to appeal to emotions. But this requires a far greater understanding of human psychology. It is a much harder task than describing the virtues of a product.”). This was a process to which Huxley thought only the “simple-minded” were susceptible. See HUXLEY, *supra* note 3, at 59 (“Simple-minded people tend to equate the symbol with what it stands for, to attribute to things and events some of the qualities expressed by the words in the terms of which the propagandist has chosen, for his own purposes, to talk about them.”) Given the prevalence of this technique, is it any wonder that many people do not want to admit it works on them?

75. There is an argument that advertising for some products is untruthful, even though the advertising does not appear to make any claims. The paradigm example is cigarette advertising that portrays apparently happy healthy people smoking. The anti-smoking campaign begun by the State of Florida is called “Truth” and proceeds from the premise that tobacco advertising is misleading. See *The Whole Truth*, at <http://www.wholetruth.com/> (last visited Nov. 21, 2001).

For the most part, this conceptual and practical difficulty has been avoided as the cases coming before the Supreme Court have involved factual claims like alcohol content⁷⁶ or price⁷⁷ that are susceptible to verification. Nevertheless, the issue was raised, although not decided, in the FDA's recently rejected regulations for tobacco advertising.⁷⁸ It is also raised by various other objections to advertising influence. So, the limits of the exception for regulation of advertising that is misleading have not been tested nor pushed much thus far.

More problematic for the future stability of the commercial speech doctrine is that the Supreme Court's reservation to the government of the right to regulate advertising for its truth essentially constructs the commercial speech doctrine as the mirror image of ordinary First Amendment doctrine. That is, because of its wording, the First Amendment is usually thought of as a restriction on the government's ability to act as arbiter of the truth of the speaker's statement. Nevertheless, in *Virginia Pharmacy*, the Court offered several reasons why it thought this limitation unproblematic with respect to advertising speech. First, the Court hypothesized the following:

The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.⁷⁹

Moreover, the Court observed, "[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled entirely by proper regulation and forgone entirely."⁸⁰ In other words, the Court found it self-evident that advertising was effective in stimulating consumers to buy and thereby effective in generating profits. Whether or not these profits are, on the whole, the product of purchases made via rational deliberation on the basis of only the *informational* aspect of advertising is another question not addressed by the Court. However, its decisions clearly imply this.

76. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

77. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

78. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

79. *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24. Of course, a motive to disseminate information does not necessarily mean a motive to disseminate *truthful* information.

80. *Id.* (emphasis added).

In general,⁸¹ the Supreme Court's decisions with respect to commercial speech have followed *Virginia Pharmacy*, as illustrated by the decisions in *Central Hudson*⁸² (the case that set out the reigning test), *Rubin*,⁸³ 44 *Liquormart*,⁸⁴ and most recently, *Lorillard*.⁸⁵ Without elaborating on the test the Court imposed for such regulation or the subsequent modifications of that test, it is sufficient here to note the following aspects of *Virginia Pharmacy* and many of the subsequent commercial speech cases.

First, there is the emphasis on the listener's right to hear, rather than the speaker's right to speak. Second, in these cases, the listener's rights are predicated on the assumption that advertising may convey "information" to which they are entitled as a matter of social policy because that information is a necessary predicate to rational decision-making. Third, in all of these decisions, one can discern an implicit assumption that the operation of the free market is free, natural, and non-coercive.

In *Central Hudson*, the Court most unequivocally stated its position: "The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."⁸⁶ Ac-

81. There have been exceptions. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 331 (1986), the Supreme Court upheld a Puerto Rican restriction on the advertising of casino gambling to local residents. Many viewed this as an indication that there might be a vice exception to the emerging commercial speech doctrine. See Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 67 (1988). However, this possibility was foreclosed by the Court's rejection of a vice exception and its apparent rejection of the *Posadas* decision in 44 *Liquormart*. See 44 *Liquormart*, 517 U.S. at 513-14 (1996). Although the Court did not explicitly overrule *Posadas* in 44 *Liquormart*, it might as well have since it concluded that the First Amendment analysis therein was "erroneously performed" and it "decline[d] to give force" to it. *Id.* at 510.

82. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 570-72 (1980) (striking down a regulation that prohibited advertising by electric utility companies except to promote energy conservation). In fact, *Central Hudson* modified the *Virginia State Board of Pharmacy* approach somewhat by elaborating a four-part test for regulations restricting commercial speech. First, the speech must concern a "lawful activity and not be misleading"; second, to survive challenge the government interest in regulation must be "substantial"; third, the government's regulation must directly advance the interest asserted; and fourth, the regulation must not be more extensive than necessary to serve that interest. *Id.* at 566. The *Central Hudson* test is the applicable one in force today.

83. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995) (striking down a regulation prohibiting alcohol content from appearing on beer labels).

84. 44 *Liquormart*, 517 U.S. at 489 (1996) (striking down state regulation restricting price advertising for alcohol).

85. *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404 (2001) (striking down various Massachusetts regulations of tobacco advertising as failing to meet the *Central Hudson* test).

86. *Central Hudson*, 447 U.S. at 563 (emphasis added) (citations omitted).

cording to this view, speech is protected precisely because it conveys information, as opposed to opinion, normative views, self-expression, and the like. As mentioned above, this inverts what is thought of as the quintessential area of First Amendment protection,⁸⁷ i.e., self-expression, opinion, viewpoint, and the like, which may not be tested for its truth. Thus, within the commercial speech doctrine, the Court offers as inherently true a statement that outside of commercial speech would seem equally self-evidently untrue: "The government *may ban forms* of communication more likely to deceive the public than to inform it."⁸⁸

Perhaps, even more significant than the focus on advertising's informational content is the Court's assumption (hope?) about what the public will *do* with this information. The Court in *Central Hudson* seems to believe that information is a necessary predicate to "intelligent and well informed" decisions.⁸⁹ It is difficult to quarrel with that assumption. However, the Court's further assumption that consumer decisions will be, "in the aggregate," "intelligent and well informed,"⁹⁰ appears more doubtful. It might be less doubtful if in advertising the public received *only* "information" (whatever that category may be). However, advertising offers the public some material that is at least arguably in between information and the deception that the *Central Hudson* Court felt so confident in proclaiming was not protected by the First Amendment. This offered material is presumably that which the rational and intelligent decision-maker will filter out. The terrain of this material is perhaps partially captured in the doctrine of puffing. Alas, it appears that it is precisely the stuff that we are supposed to filter out that plays a big role in convincing us to buy.

87. For an example of this anomaly, see Professor Schauer's exploration of the First Amendment and tort law. Frederick Schauer, *Mrs. Palsgraf and The First Amendment*, 47 WASH. & LEE L. REV. 161 (1990). In this article, Professor Schauer proposes a hypothetical in which instructions for the removal of protective devices on a chainsaw might be seen as part of the causation in fact of an injury resulting from the removal of the protective devices. *Id.* at 164-65. As it stands, the First Amendment might protect the manufacturer from liability (at least theoretically), *id.* at 165, and so he proposes that a distinction might be made, *inter alia*, on the grounds that these instructions are not the type of communication protected by the First Amendment because they are strictly informational and are factual and not normative. *Id.* at 168. Of course, it was precisely on the basis of the informational character of the speech that the price information in *Virginia State Board of Pharmacy* was granted protection. Conversely, if the attempt to persuade in advertising is the type of speech most closely aligned with First Amendment interests, then it would seem that it is the advertiser's *non-factual* claims that are most protected. Yet, if the non-factual elements are deceptive or misleading, then *Virginia State Board of Pharmacy* dictates that they are *not* protected.

88. *Cent. Hudson*, 447 U.S. at 563 (emphasis added).

89. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

90. *Id.*

C. "Puffing": Advertising Manipulation as Trivial and Inconsequential

Puffing is a defense to a claim of fraud and/or breach of contract. "Simply stated, puffing is sales talk that the buyer should discount when making a transaction because no reasonable person under the circumstances would rely on the statement when contemplating a purchase."⁹¹ It is a form of confession and avoidance. "Yes, such and such was said, but you should not have believed me when I said it" is the gist of the defense. "Puffing describes a gray area separating non-specific matters which [sic] cannot rationally support a decision from statements of a more specific, and thus, deceptive nature."⁹²

However, even specificity will not convert puffing to fraud if the specificity itself is said to be of a nature that no reasonable person ought to believe. Thus, when General Motors claimed that its anti-lock brake system ("ABS") was "99 percent more effective"⁹³ than protective systems such as airbags and, therefore, that buyers were "100 times more likely to benefit"⁹⁴ from them than airbags, consumers could not recover against GM when these statements turned out to be untrue. A court held "that such claims, often involving large numbers, are puffing because a consumer cannot reasonably believe there is a test behind the claim."⁹⁵

Yet, if no reasonable person would believe or rely on these claims, why was GM making them? If no reasonable person would believe these claims, one must conclude either that GM hoped that the vast majority of potential buyers were unreasonable, or that it was including unnecessary, superfluous material in its ads. Neither of these possibilities seems very likely. What seems more likely is that GM believed that most consumers would be influenced (consciously or unconsciously) by these statements.

Whatever GM's advertisers thought about the buying public, what does the *Tylka* court's rejection of the consumers' claim that these statements were intentionally made, fraudulent, and misleading reflect that it thinks of the public? One reading of the opinion is that the court operated from the presumption that most consumers are reasonable and that the consumers who sued represented some unreasonable minority. An observation made by the court reflecting a belief that the unreasonable consumer ought to suffer the consequences of

91. *Tylka v. Gerber Prods. Co.*, No. 96-C1647, 1999 U.S. Dist. LEXIS 10718, at *18-*19 (N.D. Ill. July 1, 1999), *vacated by Tylka v. Gerber Prods. Co.*, 211 F.3d 445 (7th Cir. 2000).

92. *Tylka*, 1999 U.S. Dist. LEXIS at *19.

93. *In re Gen. Motors Corp. Anti-Lock Brakes Prods. Liab. Litig.*, 966 F. Supp. 1525, 1531 (E.D. Mo. 1997), *aff'd*, 172 F.3d 623 (8th Cir. 1999).

94. *In re Gen. Motors*, 966 F. Supp. at 1531.

95. *Id.*

their unreasonableness supports this construction of the opinion. "There are some kinds of talk which [sic] no sensible man takes seriously, and if he does, he suffers from his own credulity."⁹⁶

Statements like this, offered in support of the puffing doctrine, seem to contain an amount of self-congratulation that the speaker is not one of the credulous. Also, these statements reflect a sort of paternalistic determination to discipline the credulous. What are we to make of the widespread usage of puffing, which apparently no one should take seriously? Its widespread use implies a conviction on the part of advertisers that such statements will in fact be convincing. So, who are all these rational people who will not be deceived by advertising? As advertising clearly works, it can hardly be the great bulk of people; advertising would not work unless it worked on a sizable number.

Then, is the puffing defense aspirational, that is, are most consumers not permitted to rely on statements that the makers intend for them to rely on because it would not be "good for them" if we allowed people to recover for such reliance? If so, then the puffing defense itself looks like a paternalistic effort to get people to be more wary. Yet, it is precisely on anti-paternalism grounds that regulation of advertising is resisted.⁹⁷ Relegation in the law of a number of promises, pitches, and claims in advertising to the category of puffing would seem to doom a very large group (by the advertisers' calculations) to suffer the consequences of their credulity. Therefore, it seems reasonable to ask which response is elitist and which is paternalistic: The regulation of commercial advertising to eliminate puffing (the protective, "I will do it for you" model) or the puffing doctrine itself (the "tough love," "this is going to hurt me a lot more than it hurts you" model)?

Again, the answer to this question may depend upon how widespread you believe rationality is. Although still elitist and paternalistic, the puffing doctrine does not look so draconian if one thinks that those suffering from their credulity are likely to be very few—particularly if you think this "suffering" is not very serious and is easily corrected. Indeed, this appears to be the general attitude toward commercial advertising. Even those critics, such as Huxley and Herbert Marcuse, who have viewed with suspicion the emotive and, to their way of thinking, manipulative appeals of advertising have tended

96. *Id.* (quoting Judge Learned Hand in *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (1918)).

97. See, e.g., Smolla, *supra* note 13; Neuborne, *supra* note 13.

to view such manipulations as harmless when confined to product advertising.⁹⁸

However, if instead of assuming that the rational person is unaffected, we assume (1) that rationality offers little defense against emotional, provocative, and evocative appeals, and (2) that such appeals may cause harms that are difficult to correct or reverse, then the harm is manifest. It only remains hidden by the attachment to a vision of rationality and autonomy that appears to be, at least empirically, misplaced.

As noted previously, in the commercial speech cases, the Supreme Court has relied on an assumption that commercial advertising did or might provide information that would, in the aggregate, produce rational and intelligent decisions in the market. This assumption is necessary to the construction of regulation as paternalism. That is, if most consumers are rational, then regulation is paternalism imposed on the majority for the benefit of the minority. Yet even if most consumers are rational, the Court's analysis is dependent upon the further assumptions that (1) commercial speech conveys information and (2) this information is crucial to rational and intelligent decision-making. The validity of these assumptions is explored in the following sections.

II. THE FIRST AMENDMENT, AUTONOMY, RATIONALITY, AND PATERNALISM

"This fear of losing reason is a fear of loss of control"⁹⁹

Since the concepts of autonomy, rationality, and paternalism are important to theories regarding the First Amendment, I propose to explore these concepts here. However, it is useful to begin at the most basic level of analysis in order to dispose of the misconception (albeit primarily a lay misconception) that commercial speech is covered by the First Amendment simply because it is communication of some form and to see where the disposal of that notion leads us. While from a strictly literalist standpoint this is one possible reading of the First Amendment (it does after all say "speech"),¹⁰⁰ as a matter of Supreme Court jurisprudence it is incorrect. Pursuant to that jurispru-

98. HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* 91 (1964) (noting the associational linkage of image with meaning and concluding that it is only "[b]eyond the relatively harmless sphere of merchandising" that the consequences of such techniques are "serious" (emphasis added)). It is unclear whether Marcuse thought this harmless because few people would be moved by such techniques or because the harm itself would be relatively trivial.

99. PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 21 (1998).

100. U.S. CONST. amend. I.

dence, it is axiomatic that not everything that is speech is "speech" for the purpose of the First Amendment.¹⁰¹ Similarly, not everything protected as speech by the First Amendment is verbal.¹⁰² For example, contracts are usually made and executed in language, but there exists no free speech right either to enter into or to breach contracts. Contracts are simply seen as outside the protection of the First Amendment altogether. Similarly, offers of bribery are conveyed by speech, but there is no suggestion that the First Amendment right to freedom of expression extends to offers of bribery.¹⁰³ On the other hand, much of what is not immediately obvious as speech, for example painting, dance, or music, is considered protected by the First Amendment.¹⁰⁴

Usually, the response to this dilemma is to try to distinguish categories of protected versus unprotected speech on the basis of theories about what the First Amendment is supposed to protect, rather than on a speech/not speech basis.¹⁰⁵ For example, Robert Bork argued that the First Amendment is only intended to protect political values and, therefore, First Amendment protection ought not to be extended to nonpolitical types of speech.¹⁰⁶ Other theories about the values animating the First Amendment have relied on the search for truth,¹⁰⁷ the preservation of dissent, and the preservation of autonomy, in either the positive or negative visions of that term.¹⁰⁸ Of these, respect for autonomy is most relevant for this discussion although, as

101. See Frederick Schauer, *Categories and The First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 273 (1981) ("[T]he constitutional definition of the word 'speech' carves out a category that is not coextensive with the ordinary language meaning of the word 'speech.'").

102. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (nude dancing); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991) (nude dancing); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (wearing black arm bands).

103. I am indebted to Professors Richard Fallon and Fred Schauer for these examples.

104. The decision in *Pap's A.M.* verges on the surreal in that the majority of the Supreme Court concluded that there is a connection between crime and prostitution levels and the presence or absence of pasties and G-strings for nude dancers. *Pap's A.M.*, 529 U.S. at 280. That serious people can take such proposals seriously while expressing doubt about the connection between, for instance, advertising and cigarette smoking, is surreal.

105. For a discussion of this approach by others seeking to identify the value protected by the First Amendment, see Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983) (suggesting a multi-value versus a unitary value theory). See also, Schauer, *supra* note 101, at 276-77 (probably no single theory of core value can explain protection for speech).

106. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

107. The most frequent source for this argument is the writing of J.S. Mill, and his idea that truth is most likely to emerge where there is a free exchange of ideas. See JOHN STUART MILL, ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN: THREE ESSAYS 22-68 (Oxford University Press 1971) (1859).

108. See Fallon, *supra* note 38, at 880-85 (describing negative and positive libertarian constructions of First Amendment theory).

may become more evident below, all of the other theories may be implicated as well, depending upon the reader's sympathies and values. Although scholars disagree over what advances or detracts from autonomy, what is striking is the way in which these views seem to share a common notion both of autonomy as rationally based and of what rationality means.¹⁰⁹ Moreover, that rationality is primarily a normative, aspirational construct than an empirical one.¹¹⁰

A. Visions of Autonomy

At the outset, it is not clear what "autonomy" means. Autonomy may or may not mean the same thing as "freedom" or "liberty." Indeed, much of the literature uses all three words interchangeably. For purposes of much of this discussion, it seems that there is no meaningful distinction.¹¹¹ Does "autonomy" only mean "freedom from government interference,"¹¹² or stated alternatively, does it mean the freedom to say or do whatever one wants? This is what Professor Fallon has characterized as the "negative liberty" to be free from external constraint.¹¹³ It can be contrasted with a vision of autonomy as "positive liberty," that is, "rational authorship of one's ends in action."¹¹⁴

However, as Professor Fallon points out, these two constructions are oversimplified and do not compel any particular conclusion. Rather, he proposes two alternatives: "descriptive autonomy" and "ascriptive autonomy." "Descriptive autonomy," which refers to a person's actual degree of measurable autonomy, involves an empirical question.¹¹⁵ In contrast, "ascriptive autonomy" refers to a person's right to make one's own decisions, no matter however unwise or ill-

109. For a theory of the First Amendment that is strongly committed to an assumption of rationality, see FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* (1981). For a critique of this theory, see Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199, 204-09 (1983) (noting that Haiman's reliance on listener responsibility seems not only empirically false, but also to absolve speakers of responsibility without offering any justification for this dichotomy).

110. See Schauer, *supra* note 109, at 207 (describing Haiman's concept of rationality as largely normative not descriptive).

111. See, e.g., Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 165 (referring to Kant's theory). Professor Wells's observation about the interchangeability of these words in Kant's writing is applicable to other writers as well, for example J.S. Mill, as will be seen below. But see GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 12-20 (1998) (arguing that liberty and autonomy are not synonymous and that certain restraints on liberty are consistent with autonomy).

112. Wells, *supra* note 111, at 163 (concluding that both sides in the public debate over the First Amendment and hate speech seem to share a common understanding of autonomy).

113. Fallon, *supra* note 38, at 876.

114. *Id.*

115. *Id.* at 877-78, 886-93.

considered. In other words, one is free to make one's own mistakes¹¹⁶ as a part of the "moral entailment of personhood."¹¹⁷ This construction also seems to parallel J.S. Mill's argument that "[t]o give any fair play to the nature of each, it is essential that different persons should be allowed to lead different lives."¹¹⁸ In this view, autonomy "is no more subject to measurement and comparative assessment than is personhood itself."¹¹⁹

Although, according to Fallon, these categories may at first glance seem to track the same visions as the labels "negative liberty" and "positive liberty," they do not. Instead, Fallon argues that a certain amount of paternalistic regulation, for example in cigarette advertising that "manipulatively lure[s] people into addiction," is completely compatible with descriptive views of autonomy.¹²⁰ In contrast, he argues that visions of ascriptive autonomy would be "incompatible with much if not all paternalism."¹²¹ However, as Fallon notes, not even ascriptive autonomy is "wholly without empirical foundations."¹²² "Ascriptions of personhood themselves require minimal capacities to reason and formulate a *conception of the good*."¹²³

Since I am unsure that respect for someone's personhood in this ascriptive sense entails any requirement that people have minimal capacities to reason, I am equally unsure that this is quite right. Even the insane and those in a persistent vegetative state, to state just two examples, are said to be "persons" for purposes of the law.¹²⁴ Minimal

116. *Id.* at 878.

117. *Id.*

118. MILL, *supra* note 107, at 78 (Ch. III, "Of Individuality as One of the Elements of Well-Being"). Note that this is an example of overlapping justifications, as Mill's argument parallels his idea that the greatest diversity of ideas will be most likely to lead to the discovery of truth. See *id.* at Ch. II ("Of Liberty of Thought and Discussion").

119. Fallon, *supra* note 38, at 878.

120. *Id.* at 877.

121. *Id.* at 878.

122. *Id.* at 878 n.15.

123. *Id.* (emphasis added).

124. *Baxstrom v. Herold*, 383 U.S. 107, 114-15 (1966) (the insane are persons for purposes of the equal protection clause; therefore, petitioner was entitled to a judicial hearing on his "dangerousness" prior to his classification as criminally insane and resulting judgment for additional confinement); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269-85 (1990) (the fact that a patient was in a persistent vegetative state did not mean that the state could require proof by less than clear and convincing evidence of the patient's wishes before withholding food and water that would ultimately result in her death). Nevertheless, the boundaries of personhood and what consequences follow from this designation continue to be extremely controversial, particularly with respect to abortion. From time to time, arguments have been offered that some capacity to reason or that a capacity to enjoy some quality of life is essential to personhood. For some examples, as well as a counterargument, see Robert A. Destro, *Quality-of-Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. CONTEMP. HEALTH L. & POL'Y 71 (1986).

capacities to reason and formulate a conception of the good, instead seem to dictate how much government interference (paternalism) is deemed acceptable. However, this brings us back to the same dilemma posed by descriptive autonomy. Thus, even the ascriptive autonomy concept as employed in the First Amendment area does not rely on personhood, but on some baseline assumptions about rational functioning. What matters then is what that baseline conception of rationality is. Research into the human reasoning process offers some fairly compelling evidence that the baseline conception of rationality under which the courts appear to operate is little more than wishful thinking.

B. Autonomy and Rationality: The Importance of Being Rational

What is rationality? Just like with autonomy, a satisfying definition is elusive. For example, "rational" is defined in Webster's Ninth Collegiate Dictionary as "having reason or understanding."¹²⁵ Then, what is "reason"? When you look up "reason" you find "the power of comprehending, inferring, or thinking esp[ecially] in orderly, rational ways."¹²⁶ Clearly, this is not very illuminating. In Western philosophy, rationality is usually conceived of as a dispassionate evaluation of known facts and has been traditionally privileged and elevated over other modes of thinking.¹²⁷ In a common view of the Kantian construction, "[a]n autonomous person is one who judges and acts freely . . . by principles of reason alone."¹²⁸ This implies, and the implication is indeed borne out in other literature, that "rationality" is the opposite of "emotionality" or instinct. Rational thought processes are deemed those uninfected with bias, emotion, custom, history, and so forth.¹²⁹

Assuming that some number of people meet these criteria, the traditional, liberal construction of the First Amendment is that it restricts the government from interfering with "*our ability to deliberate*

125. WEBSTER'S NINTH COLLEGIATE DICTIONARY 977 (9th ed. 1996).

126. *Id.* at 981.

127. See, e.g., Thomas Aquinas, *Summa Contra Gentiles*, in ETHICS: SELECTIONS FROM CLASSICAL & CONTEMPORARY WRITERS 128 (Oliver A. Johnson ed., 8th ed. 1999) ("Intellect is superior to sense."). With "rationality" thus privileged and exalted, it is hardly surprising that women were said to lack it, thus justifying their exclusion from politics and public life.

128. Wells, *supra* note 111, at 165 n.30 (quoting ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 46 (1989)) (emphasis added).

129. See SCHLAG, *supra* note 99, at 22 ("[A]mong contemporary American legal actors, reason stands in a generally superior position to other sources of belief such as authority, experience, convention, tradition, ethics (and so on)."). This list is itself subject to dispute because it would seem that experience has to be a part of what makes for a "reasoned decision."

and our capacity to choose.”¹³⁰ Such governmental interference is viewed as interference with autonomy. However, deception itself is also interference with the ability to deliberate and the capacity to choose.¹³¹ Deception as interference with the rational thought process appears to be the basis for the judicially constructed exception to First Amendment protection for commercial speech.¹³²

This construction begs the question: What is our “ability to deliberate?” Here again, we are presented with unarticulated baselines and norms that are implied in the law. What sort of deception is supposed to be pierced by the average person? Apparently, if one agrees with the puffing doctrine, most advertising should be transparent. However, behavioral research provides some illumination regarding the human capacity for rationality and undermines the assumption that most people will be able to regularly and consistently see through advertising. In this respect, behavioral research also undermines the assumptions on which the commercial speech doctrine is predicated.¹³³

C. Behavioral Research and “Normal” Rationality

Traditionally, “reason” has tended to denote or imply cognition without passion.¹³⁴ Indeed, this is probably the predominate social understanding of the term. Although there are notable exceptions, for instance Mill’s exhortation that liberty requires “energy,”¹³⁵ much writing on the subject seems to suggest that the path to reason involves the elimination of both the emotional constituents of reason and reliance on the unexamined, for instance, tradition.¹³⁶ However, there is some reason to believe that this vision is misplaced because our emotions constitute an important part of our thought processes that cannot be eradicated even if it were desirable to do so.¹³⁷

130. Wells, *supra* note 111, at 167 (emphasis added).

131. *Va. State Bd. of Pharmacy*, 425 U.S. 748 (1976).

132. *Id.* Actually, as noted above, this exception in the commercial speech area for speech that is false or misleading is itself an exception. No such restriction to First Amendment protection is applied to political speech. If truth is crucial to people’s rational decisions in the market, is it any less so for their decisions in the political sphere?

133. Put another way, the commercial speech doctrine (indeed much First Amendment theory) is heavily dependent upon the rational choice model.

134. “There is a long tradition criticizing the rationality and functionality of emotions. In this tradition, which pervades much of current culture, *emotions are regarded as an impediment to rational reasoning and hence as an obstacle to normal functioning.*” AARON BEN-ZE’EV, *THE SUBTLETY OF EMOTIONS* 161 (2000) (emphasis added).

135. MILL, *supra* note 107, at 87 (Ch. III “On Individuality, As One of the Elements of Well-Being”). “Energy,” as Mill uses the term, seems synonymous with “passion” or “enthusiasm.”

136. See SCHLAG, *supra* note 99.

137. See ANTONIO R. DAMASIO, *DESCARTES’ ERROR* xi–xii (1994).

Worse still, behavioral research has discovered that human beings' capacity to reason, even when employing what appears to be only "reason," is subject to predictable biases.¹³⁸ Significantly, these biases are relatively intractable; that is, they are observable even in subjects who have been made aware of their existence.¹³⁹ These biases might be called "illusions of the mind which are 'neither rational, nor capricious.'"¹⁴⁰

Although a comprehensive discussion of this topic is beyond the scope of this article, it is sufficient to summarize a few of these biases that are particularly relevant to advertising:¹⁴¹

1. *Confirmatory Bias*.¹⁴² The tendency to misread evidence as confirming or supporting a hypothesis previously established. This is more familiarly known as the "do not confuse me with the facts" bias. ("The French have a high fat diet and lower rates of coronary heart disease, so I do not need to worry about fat.")¹⁴³
2. *Motivated Reasoning*.¹⁴⁴ The tendency to review evidence in such a way as to arrive at a desired conclusion. This is more familiarly known as "rationalization." For example, one employing

138. See, e.g., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) [hereinafter JUDGMENT].

139. Amos Tversky & Daniel Kahneman, *Belief in Small Numbers*, in JUDGMENT, *supra* note 138, at 30 (many biases "survive considerable contradictory information").

140. Hanson & Kysar, *supra* note 32, at 633 (quoting Massimo Paitelli-Palmiari, *Probability Blindness: Neither Rational nor Capricious*, BOSTONIA, Mar.-Apr. 1991, at 28 (quoting Tversky & Kahneman, *supra* note 139, the preeminent behavioralism researchers on cognitive biases)).

141. There is a vast literature on the subject, but a good overview in the legal field is Hanson & Kysar, *supra* note 32. For a discussion of the evidence of manufacturer manipulation of consumers' perception of risk in the product liability area, see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation* 112 HARV. L. REV. 1420 (1999) [hereinafter TBS II].

142. Hanson & Kysar, *supra* note 32, at 647-48.

143. For awhile, the consumption of wine was touted as the reason for the lower rate of French coronary heart disease, and wine makers eagerly jumped on this explanation to ask for labels on wine proclaiming its health benefits. Today, it appears that this hypothesis may have been overstated. See Hilary Abramson, *The Flip Side of French Drinking*, in THE MARIN INSTITUTE FOR THE PREVENTION OF ALCOHOL AND OTHER DRUG PROBLEMS, Winter 2000, at 1-7 (reporting that current research concludes that the health benefits of drinking wine are extremely modest and that many of the original supporters of the "French paradox" have backed away from their earlier statements), available at <http://www.marininstitute.org/NL2000.html> (last visited Oct. 29, 2001); see also David Jerigan, *Drink Like the French, Die Like the French*, in THE MARIN INSTITUTE FOR THE PREVENTION OF ALCOHOL AND OTHER DRUG PROBLEMS, Winter 2000, at 8 (documenting that the French die of cirrhosis of the liver fifty-seven percent more often than Americans and have proportionately double the number of alcohol related deaths).

144. Hanson & Kysar, *supra* note 32, at 653.

this line of reasoning might say, "I am so busy I *need* to fly first class."

3. *Optimistic Bias*.¹⁴⁵ The tendency to underestimate probability that an undesirable occurrence (divorce, illness, death) will happen to the individual. This is the "it could not happen to me" bias. (The tobacco industry relies heavily on this bias.)

4. *Cognitive Dissonance*.¹⁴⁶ The tendency to disregard evidence of unpleasant realities. This is more commonly referred to as "denial." (Also very important to tobacco industry.)

5. *The Illusion of Control*.¹⁴⁷ The tendency to treat chance events as if either they involved skill or there were a causal relationship between the event and some action by the person. Also known as the "God complex." ("The phone always rings when I get in the shower!")

6. *Hindsight Bias*.¹⁴⁸ The tendency to evaluate probabilities of an occurrence higher in the face of a known occurrence of the event than in the absence of such knowledge. This is commonly known as "Monday morning quarterbacking" and "20/20 hindsight."

7. *Availability and Representativeness Biases*.¹⁴⁹ The tendency both to calculate probabilities on the basis of the most available, and often the most vivid, facts and to attribute greater weight to known occurrences than is appropriate. Advertising may rely heaviest of all on this feature, as it is the basis for "brand identification."

8. *Anchoring and Adjustment Effect*.¹⁵⁰ The tendency to anchor an estimate on a readily available figure despite knowledge of its irrelevance to the calculation. (Otherwise known to car salespersons as the "sticker price effect.")

145. *Id.* at 654–55.

146. *Id.* at 658.

147. *Id.* at 658–59. Actually, the term "illusion of control" could be appropriately applied to any situation in which people ascribe to themselves powers that appear to deny their fallibility, for example, "Advertising does not affect me!"

148. *Id.* at 659–60.

149. *Id.* at 662–67.

150. *Id.* at 667–68.

The above list is by no means exhaustive and is only meant to be illustrative. However, as I hope the somewhat satirical examples and parentheticals illustrate, to some extent the discovery of these biases is not news. We have always known that we were susceptible to them. What is different, or at least apparently insufficiently appreciated, is that the research demonstrates that they apply to *all* of us, not just a benighted, unfortunate few. Further, while these biases do not invariably operate in all cases, they are fairly resistant to correction through education.¹⁵¹ So, there is little or no correlation between these biases and education or intelligence. Thus, we have students at Yale insisting that if they just had more practice, they could get better at predicting a coin toss!¹⁵²

Moreover, it appears that asking people to deliberate actually increases the likelihood of certain types of errors. In many cases, and counter to our usual expectation, it is experts who are most susceptible to some of these biases.¹⁵³ Finally, of particular relevance to the problem of sorting the informative "information" from the noninformative in advertising, some research suggests that people's evaluation of probabilities is less accurate when they are given additional, irrelevant information for their decisions—less is more when it comes to reasoning accurately.¹⁵⁴ Evidently, it turns out that there *can* be such a thing as "Too Much Information."¹⁵⁵ Thus, counter to common cultural assumptions, many of these biases are unavoidable and not simply committed by the uneducated, the credulous, or "the other guy." This will have particular significance when I examine the claim by

151. *Id.* at 657 (referring to the optimistic bias). This holds true for many of the other biases. For example, the anchoring bias operates even when the anchor is known to be irrelevant to the calculation. The news that these biases are resistant to correction by education is significant. Thus, the hope that Vance Packard offered that consumers could defend themselves because "we cannot be too seriously manipulated if we know what is going on," PACKARD, *supra* note †, at 265, appears to be misplaced.

152. Hanson & Kysar, *supra* note 32, at 659 (citing Ellen J. Langer & Jane Roth, *Heads I Win, Tails Its Chance: The Illusion of Control as a Function of the Sequence of Outcomes in a Purely Chance Task*, 32 J. PERSONALITY & SOC. PSYCHOL. 951 (1975)). See also Ellen J. Langer, *The Illusion of Control*, in JUDGMENT, *supra* note 138, at 231.

153. TBS II, *supra* note 141, at 660–62.

154. *Id.* at 665.

155. DURAN DURAN, *Too Much Information*, on DURAN DURAN (Capitol Records 1993). This idea is also echoed by Gerald Dworkin in his discussion of the costs of choice. See DWORKIN, *supra* note 111, at 62–81. Dworkin notes that a proliferation of choices can lead to what Kierkegaard referred to as "the despair of possibility." *Id.* at 73 (citing S.A. KIERKEGAARD, FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH 169 (Walter Lowrie trans., 1954)). Since, for purposes of public policy, the proliferation of choices in the marketplace is usually assumed to be an unambiguous good, this is an argument that has been missing from the discussion of the value of advertising.

many that they are unaffected by advertising, discussed below in Part III.

D. Rationality and Autonomy as Normative Constructs

We knew all these biases existed. So, what explains the persistence of the belief that they can be avoided? Perhaps, it is cognitive dissonance in the face of an unpleasant fact. At least that is certainly part of the story. Yet, another part is that the definition of "rational" unavoidably involves a degree of measurement against cultural values. Because rationality is privileged, to call something or someone "irrational" is to make a value judgment. However, determining what is "rational" is inseparable from the values held by the person.¹⁵⁶ You cannot know whether someone's actions are rational, in the sense of being logically related to the furtherance of his or her goals, until you know what those goals are. Thus, what qualifies as rational is an inquiry inextricably tied up with value judgments. An action will be deemed "rational" if it seems to advance a goal that others agree is "desirable" or "normal" in some identifiable way or would appear likely to do so even if it turns out not to do so in fact. First Amendment jurisprudence reveals some of the contours of what the law considers rational and where and when that assumption may be dropped.

Set against behavioral research, most First Amendment jurisprudence with respect to commercial speech appears to be what Professor Pierre Schlag might call "as if jurisprudence"¹⁵⁷—insofar as courts act "as if" consumers were rational in the traditional sense of the word and ignore evidence of limitations on rationality. However, the courts acting "as if" does not mean that they assume this construction of rationality for all cases. Rather, they adopt a particular construction of rationality. Within that conception, there are certain acceptable limitations on the ability to reason that apparently form the basis for the parallel acceptable exceptions to a general proscription on paternalistic intervention by the government.

These exceptions, the areas where the Supreme Court appears willing to drop the assumption of rationality, correspond to what can be otherwise categorized as "low value speech": fighting words, ob-

156. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) (arguing that men and women may tend to define "responsibility" and "morality" differently based on different value structures).

157. SCHLAG, *supra* note 99, at 108–11. Schlag is referring to a different "as if" enterprise with respect to the law as a whole and the resort to an "as if" construction to avoid committing to metaphysical constructions. Still, I think it fair to say that a similar exercise goes on here. That is, many legal commentators extol or defend a particular vision of rationality that, if pushed, they would concede is only an "as if" construction that is not literally true.

scenity, commercial speech, and libel.¹⁵⁸ In these cases, one construction of what the Court has done is to determine that this sort of speech does not appeal to rational faculties either because it inspires an emotional (fighting words) or "animalistic" response (obscenity) or because it may rely on feeding false information into the rational thought process (false or misleading commercial advertising and libel).¹⁵⁹

In other words, one's views on these questions are connected with what one thinks someone ought to rise above by virtue of his or her "reason," as well as what is so harmful that it is akin to an assault on the emotions or the personhood that no one can be expected to resist, that is, a coercive act and not "mere words."¹⁶⁰ Stated another (perhaps circular) fashion, how acceptable government regulation is deemed to be may depend upon how, where, and when it is considered normal or acceptable for rationality to break down. If it is considered normal for rationality to break down in the face of fighting words, then the law may step in. Conversely, if a particular kind of speech does not bother the law-givers in this way, then it is not surprising that it is not viewed by them as an intrusion on their personhood. Thus, perhaps, racist and sexist speech does not bother this "reasonable man" or intrude on his rational thought processes.¹⁶¹

Finally, it seems that the law reflects a deep commitment to the idea that behavior can be divided into the dispassionate or rational and the passionate or emotional in a particular way. That picture tends to mirror the self-conception of those historically in the position of law-givers. To those persons, the quintessential "rational person" has some few, predictable weaknesses in the propensity to rationality that the law will take cognizance of, weaknesses that again mirror the law-

158. Wells, *supra* note 111, at 177-86. Whatever exception is provided for by libel has been substantially reduced by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. Indeed, today, it might well be that the categories of these exceptions are empty sets in that nothing ever appears to qualify to fit into them. See, e.g., *R.A.V. v. St. Paul, Minn.*, 505 U.S. 377, 378 (1992) (striking down a St. Paul hate speech statute as unconstitutional despite its explicit intention to cover only that speech equivalent to fighting words).

159. Wells, *supra* note 111, at 177-86. Has the ability to regulate false and misleading speech also become an essentially empty set represented by the categories of fighting words, obscenity and libel?

160. CATHERINE A. MACKINNON, *ONLY WORDS* (1993); Delgado, *supra* note 41.

161. Of course, that is a reality that may be somewhat different than that of another person. What are we to make of the fact that racial slurs and pornography are not considered assaults, but acceptable (if distasteful) free speech? Arguably the virtual triumph of political correctness in public speech ought to be celebrated by those who oppose governmental intervention since this triumph was gained largely without direct government intervention on speech per se. Interestingly, this is not the case. Of course, a society that tolerates endemic racism and a gigantic pornography industry may not be sacrificing very much with a little political correctness. The "rational persons" who are subject to assault by the first speech may console themselves with the correctness of the speech.

givers' own judgment of when it is "normal" to suspend rationality. However, those charged with making and enforcing the law may themselves have been influenced by an optimistic bias with respect to their evaluation of their own powers. Thus, when faced with the evidence that all people reason in various predictably irrational ways, many people prefer denial to acceptance of this fact. This denial is most glaring with respect to the effects of commercial advertising.¹⁶²

III. THE PSYCHOLOGY OF ADVERTISING

[I]t is this culture which, the world over, fascinates those very people who suffer most at its hands, and it does so through the deep, insane conviction that it has made all their dreams come true.¹⁶³

A. Advertising and denial

Any attempt to link commercial advertising to undesirable social attitudes or conditions runs up against a formidable obstacle—the obstinate and passionate denial that advertising causes or contributes to these harms.¹⁶⁴ This is curious. On the one hand, it seems to be universally accepted that advertising is essential to business. Certainly, business people think so if one judges by their expenditures on advertising. In addition, increases or decreases in sales are routinely linked to advertising. Moreover, in some areas of the law, for instance the Lanham Act¹⁶⁵ and trademark infringement, the idea that an infringement on a trademark (the value of which is created by advertising) can "cause" lost profits¹⁶⁶ does not seem to raise any eyebrows.

Yet, when tobacco companies are accused of causing teenage smoking, the tobacco companies passionately deny that any such causation can be attributed to their advertising.¹⁶⁷ This puts them in the

162. Alternatively, perhaps it is not denial at all, but a conscious decision to choose a construction that favors the existing legal entitlements and distribution of wealth.

163. Bruce Cumings, *The American Ascendancy: Imposing a New World Order*, THE NATION, May 8, 2000, at 16 (quoting Jean Baudrillard).

164. See, e.g., Garner & Whitney, *supra* note 45, at 521–22 (describing the tobacco industry's claim that advertising does not "increase aggregate demand for tobacco products, nor is it intended to do so"). I am struck by the similarities here to the disputes over whether pornography causes injury to women or television violence inspires real life violence. See, e.g., Emily Campbell, *Television Violence: Social Science vs. The Law*, 10 LOY. L.A. ENT. L. REV. 413 (1990).

165. See 15 U.S.C. §§ 1051–127 (2000).

166. See 15 U.S.C. § 1117(a)–(b) (2000) (providing both for damages in form of defendant's profits and plaintiff's losses and for trebling of damages).

167. See Garner & Whitney, *supra* note 45, at 521–23.

rather peculiar position of arguing that the billions they spend a year on advertising is spent on something that has little or no effect.¹⁶⁸ Given that R.J. Reynolds's *intent* to recruit "pre-smokers" is no longer subject to question,¹⁶⁹ it is hard to understand how this sort of defense has any credibility. Yet it does because although most people seem to believe that advertising is essential to business, given that advertising successfully generates customers, people seem to simultaneously believe it works only on everyone else.¹⁷⁰ If advertising works, but no one thinks it works on them, then on whom is it working? Well, the obvious answer is that most people are wrong in thinking advertising has no effect on them. I think this phenomenon is attributable to the widespread understanding that advertising works by manipulation and no one wants to admit that they are manipulable or, if they are, that it has any negative consequences.

As marketing literature demonstrates, marketers know this about us: "*Nobody wants to admit they are in the least bit affected by advertising!* They will typically claim that they do not pay any attention to advertising despite the fact that a glance at their pantry, closet, kitchen, or garage reveals nothing but heavily advertised, name-brand consumer goods."¹⁷¹ The refusal to believe one is affected by advertising sounds a lot like denial. To get around this denial (in order to better explore the mind of the consumer), the authors of the above quote, who are marketing specialists, suggest that the savvy marketing researcher will not directly ask subjects about the influence of ads. In-

168. *Id.* at 532 ("[I]t is patently absurd to believe that the tobacco conglomerates spend over \$6 billion a year peddling their wares solely to encourage brand switching and/or brand loyalty.") (citations omitted).

169. Internal memoranda from R.J. Reynolds reflect that the company concluded it could not survive without the addition of new smokers recruited from those currently still too young to smoke. *Id.* at 533-34. Therefore, in one internal memo, the author recommended that the company's marketing include efforts to "reach out to the 'pre-smoker' or 'learner' with 'youth brands' of cigarettes." Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, at 44,480 (Aug. 28 1996) (codified at 21 C.F.R. pts. 801, 803, 804, 807, 820 & 897) (quoting a memorandum from Claude Teague, Jr., Assistant Director of Research and Development at R.J. Reynolds in 1973). These are the same regulations recently struck down by the Supreme Court as being promulgated in excess of FDA authority despite the fact that the FDA regulates drugs and nicotine is a drug. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

170. In my informal (and far from scientific) conversations with people in the preparation of this article, I have encountered responses that tend to fall into two categories: a bemused acknowledgment of the manipulation of advertising ("I love being manipulated!") to scorn ("You mean *you* think you are influenced by advertising?"). Respectively, the subtexts of the first and second comments are, "I am still in control because I allow myself to be manipulated in ways that feel good," and "Only intellectually inferior persons are vulnerable to advertising, and I, unlike you, am immune."

171. ROBERT B. SETTLE & PAMELA L. ALRECK, *WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT* 38 (1986) (emphasis added).

stead, researchers use an “indirect, projective technique” and ask subjects to evaluate ads by what they think a “friend” (one whose demographic profile looks remarkably like the subject) would think of it.¹⁷² Indeed, it is through such techniques and many decades of trial and error that marketers have come to know quite a bit about us.

B. How Advertising Works: Brands and Bonding—or Buying a “Relationship”

Advertisers want to help you have a relationship—with their brand. Brands, and their value, are created by advertising.¹⁷³ At its most obvious level, brand identification seeks to take advantage of the heuristic quality of human reasoning discussed above in the availability bias, among others. That is, by creating a brand perception, advertisers hope that you will identify the presence of a brand name with better quality, reliability, quality control, trustworthiness, and so forth.¹⁷⁴ Of course, while sometimes such perceptions are justified, sometimes they are not. However, the logic of the brand is that you will rely on the brand name as a surrogate for actually testing all of the products in a particular category.¹⁷⁵ Undoubtedly, this is a good thing in many respects, as even if you were to test several brands, you would likely find them virtually indistinguishable.¹⁷⁶ Of course, this means that your brand preference is more a matter of convenience than of any qualities intrinsic to the product.

Yet, it goes deeper than this. While it might be perfectly rational to rely on a particular brand name if you have had a positive experience with the brand’s product, advertising seeks to create that positive experience before you’ve tried it. Indeed, Settle and Alreck, the marketing experts quoted above say, “There’s a cardinal rule about choices in the marketplace that marketers often find difficult to accept:

172. *Id.* at 39.

173. Advertisers have to walk a fine line between getting consumers to identify their brand with the product and not making it synonymous with the product, such as when consumers say “Xerox” rather than photocopy, since the intellectual property interest in the brand name is liable to disappear if the advertising is that successful. See, e.g., *Union Nat’l Bank of Tex., Laredo v. Union Nat’l Bank of Tex.*, Austin, 909 F.2d 839, 845 n.15 (5th Cir. 1990) (listing trademarks lost to the designation of “generic” such as “aspirin,” “trampoline,” and “yo-yo”). For a particularly disturbing account of how the value of the brand has outstripped the value of the product with concomitant negative impact on democracy, see NAOMI KLEIN, *NO LOGO* (1999).

174. SETTLE & ALRECK, *supra* note 171, at 93–95, 114–15. See also *Who’s Wearing the Trousers?*, *THE ECONOMIST*, Sept. 8, 2001, at 27 (discussing brand building as a process of building trust and being good for consumers as a way to simplify their decision making process).

175. *Id.* at 116–17.

176. See SCHOR, *supra* note 26, at 22 (discussing how consumers in blind test failed to identify their favorite brands of beer).

The physical properties of the goods are important only to the degree that they affect consumers' PERCEPTIONS!"¹⁷⁷

That this statement is in direct conflict with the Supreme Court's vision of how the "intelligent and rational" consumer will behave should be obvious. It seems to be a fairly clear use of the confirmatory bias, that is, "do not confuse me with the facts." If the advertising or promotion successfully inspires a theory about the product in the consumer's mind, the consumer will often fit the reality to the theory.

In creating the desirable perceptions essential to selling, advertising relies heavily on non-rational thought processes. Commercial advertising is not primarily concerned with providing the consumer with information. Instead, it is concerned with creating a feeling associated with the brand. Authors Settle and Alreck label this "classical conditioning."¹⁷⁸ "By pairing the brand name of the product with stimuli that naturally elicit positive emotional responses from people, over many repetitions, consumers learn to associate the brand with positive emotions. When they think of the brand, they will have good feelings about it."¹⁷⁹

So what is so wrong with this? To illustrate, when I was a baby, my father used to feed me a hot cereal, and when I was growing up he usually cooked breakfast for my sisters and me every morning. Many years later, I remarked to my mother that I always linked hot cereal to fatherly love. It was more than just a food. What is the difference between this and the emotional bond advertising seeks to create? The difference is that my feeling and the association, however irrational, was linked to my real experience. This is not true of the emotional link described above, which is created by advertising. Instead, what advertising attempts to create might be called a "fantasy link," and fantasy is an essential part of advertising's appeal. "Consumers in the market operate on the basis of the *psychological* and *social* images of the goods they buy."¹⁸⁰

177. SETTLE & ALRECK, *supra* note 171, at 70.

178. *Id.* at 107.

179. This quote comes from a section entitled "Helping Consumers Learn." *Id.* at 106. The apparently utterly unselfconscious association of this manipulation with learning is stunning. However, it is consistent with the overall tone of the book in which the authors represent themselves as helping marketers and advertisers "understand and appreciate" consumers. *Id.* at ix. The other forms of conditioning noted are "learning by association" and "operant conditioning." *Id.* at 107. Perhaps, many people are not disturbed by the fact that they are subjects in an operant conditioning experiment to which they have not explicitly consented. I hope the following sections will unsettle such sanguinity.

180. *Id.* at 128.

C. "Follow the Yellow Brick Road": Consumption and the Illusion of Control

Chapter Nine of Jean Kilbourne's powerful book *Deadly Persuasion* borrows its title from a Toyota ad that is captioned "The Dream Begins as Soon as You Open the Door."¹⁸¹ As Kilbourne notes, "[I]f this were an ad for alcohol ('the dream begins as soon as you open the bottle') or other addictive product, '[p]erhaps we would understand what a dangerous message this is.'"¹⁸² Kilbourne notes that much of advertising relies on fantasy, fantastic constructions, and/or an appeal to the wish to escape everyday reality: "Take me away, Calgon!"¹⁸³

Both addictions and advertising offer us the promise of a much more exciting and glamorous and colorful life, instantly, via a substance or product. They offer us escape, not only from pain but also from boredom and the horror of being ordinary in a culture that equates ordinary with failure. Advertising for many products, not just addictive ones, often reinforces and normalizes the addict's belief that life is dull and unpleasant and needs to be escaped.¹⁸⁴

"Consumption promises to fill an aching void; hence the attempt to surround commodities with an aura of romance; with allusions to exotic places and vivid experiences; with images of female breasts from which all blessings flow."¹⁸⁵

What is so attractive about this message is the idea that unruly things like emotions, our life circumstances, intangible attributes like "glamour," and so forth are under our control, and that we can acquire them by buying them. By "connect[ing] the powerful images of a deeply desired social life with commodities, [advertisers] thereby creat[e] the cruel illusion that one is possible by purchase of the other."¹⁸⁶ The urge to limit danger and to control our surroundings is probably essential to survival. At the same time, such an urge directed at things outside of our control becomes dangerous to our self-image and peace of mind. Of course, it is not so easy to tell what we

181. KILBOURNE, *supra* note 47, at 217. Pertinent to this article's thesis, the subtitle of this chapter is "Advertising an Addictive Mindset")

182. *Id.* at 218. The widespread use of fantasy and/or appeal to fantasy or escapism in advertising suggests that most people do not find this sort of message dangerous. Rather, it appears that most people find this sort of advertising fun. Maybe it is just because it works.

183. See Calgon, at <http://www.takemeaway.com/> (last visited Nov. 17, 2001).

184. KILBOURNE, *supra* note 47, at 224.

185. CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 72-73 (1979).

186. Sut Jhally, *Commercial Culture, Collective Values, and the Future*, 71 TEX. L. REV. 805, 809 (1993).

can control and what we cannot, perhaps less so than ever before. Thus, the need to control is an urge that often borders on the insatiable, which is perfect for advertisers' purposes.¹⁸⁷

Marketers and advertisers try to figure out "what's going on inside consumers' minds."¹⁸⁸ Not content with simply getting inside consumers' minds to understand existing influences on decisions, advertising, through a variety of methods, is intended to *create* an association that did not previously exist in the consumer's mind between the pre-existing desirable image or concept and the product or service advertised. One of these methods is associating the goods with a stimulus.¹⁸⁹ One example is the Newport cigarettes advertising slogan, "Alive with pleasure!"¹⁹⁰ Advertisers juxtaposed this slogan with pleasant pictures of people, often couples, apparently having a good time. The idea was to have consumers associate the pleasant scene with the brand of the product.¹⁹¹

D. I Can't Get No Satisfaction—The Insatiable Need for Love, Power, and Prestige

However, the most successful appeal, and probably the most popular by far, is to associate the product with the idea of romantic or familial love. Perhaps, the principal reason for this is the "insatiability"¹⁹² of the desire for love. As Settle and Alreck put it, "Who in the world has too much love? . . . Today's consumers have (1) ample resources for goods that promise affiliations; (2) an insatiable need for friendship; and (3) few traditional sources for affiliation and friendship. Is it any wonder that they try to buy it?"¹⁹³ Yet as the authors themselves admit, "[c]onsumer goods can't really provide those who buy them with affiliation or belonging; only *people can actually fulfill such needs*."¹⁹⁴ One would think that if a product cannot satisfy the need stimulated by its advertising, this would be a prescription for failure. However, this is not the case. Rather, it seems that failure to satisfy is a necessary part of keeping the cycle going. As one observer put it, in modern America "[t]he engines of economic development

187. For example, a number of television ads for prescription drugs urge that the consumer "take control" of their diabetes, depression, premenstrual dysphoric disorder, and the like.

188. SETTLE & ALRECK, *supra* note 171, at 7.

189. *Id.* at 93.

190. KILBOURNE, *supra* note 47, at 196–98. Kilbourne also points out that, when viewed as a group, these ads seemed to also contain a disturbing theme of violence against women. *Id.*

191. *Id.* at 94.

192. *Id.* at 16.

193. *Id.* at 17.

194. *Id.*

were powered in part by a dynamic of deprivation which kept fulfillment always just out of reach."¹⁹⁵ Moreover, what the authors *do not* say is that "[t]he possession of material things serves as an *antidote* to dependence upon other people."¹⁹⁶ That is, chasing *things* to satisfy needs that can only be filled by *people* distances one from other people.

Even if you are not looking for an antidote to dependence on others, if you are bombarded with advertising implying that friendship, self-esteem, love, and the like can be acquired along with material goods, it is understandable that this distinction between people and things is liable to blur. If you are disappointed because your life does not become more social, you are not more glamorous, you have no more love, and so forth, you might view the disappointment as a failure of this *particular* product, thinking the next one might "do it." Alternatively, you might just think that there is something wrong with you. It is in this latter possibility, the triggering of our fears, that advertising does much of its work.¹⁹⁷

E. Fear as a Selling Tool

Rather than merely conjuring up pictures of love and family to inspire positive associations, advertising also preys on our fears about whether we are worthy of such love. Judging by some current advertising, we apparently have a lot of fears. We are assailed daily with messages that, if we want love, we had better look good, smell good, be thin enough, successful enough, cool enough, *ad nauseum*.¹⁹⁸ "Love is Blind not Senseless" says Scope® mouthwash against a blue, bubbly background.¹⁹⁹ The underlying message is clear. Your breath might be bad, and if you want someone to love you, kiss you, or hang around, you had better use Scope® to make sure that you measure up.

195. JACKSON LEARS, *FABLES OF ABUNDANCE* 20 (1994).

196. ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* 155 (1984).

197. Some observers would go so far as to say that there is an element of the religious in advertising's relentless appeal to these insatiable desires that seem characteristic of the human condition and inextricably intertwined with expressions of deepest held values and beliefs. "The ultimate power of advertising does not rest on its creative ingenuity or its ability to manipulate (which is not to deny its effectiveness in those areas), but on its ability to mediate the dialectic of emptying and needing." SUT JHALLY, *THE CODES OF ADVERTISING* 203 (1990).

198. Although narcissism is often assumed to involve a love of self, it is probably more accurate to describe it as an obsession with self that, more often than not, is self-critical. "Narcissus gazes at his own reflection, not so much in admiration as in unremitting search of flaws, signs of fatigue, decay." LASCH, *supra* note 185, at 91. Perhaps, this is not an accurate reading of the Greek myth's import, but it certainly seems descriptive of American psychology as reflected in advertising appeals.

199. See PEOPLE MAG., Mar. 20, 2000, at 140.

Of course, people probably worried about bad breath long before Scope®'s advertisers told them they ought to do so, but advertising seems to create some fears by bootstrapping a contrived fear onto a more general fear. Take, for instance, quality of gasoline. Prior to the introduction of ethyl additives and the advertising directed at linking ethyl with engine knock and performance, it seems unlikely that many people feared their gasoline was "inadequate." However, in 1933, Ethyl ran an ad showing a small boy complaining to his father, "Gee, Pop—they're all passing you!"²⁰⁰ Ethyl was touted as the solution to a slow car and the "next best thing to a brand new car."²⁰¹ To be sure, the development of lead additives to gasoline was a response to consumer complaints about engine knock.²⁰² Racing and not wanting to be passed up certainly are not the inventions of advertisers. What is interesting is how they are combined to create notice, to draw your attention to the fact that here is a "problem" that perhaps you did not know you had, as well as the solution. Thus, concepts and concerns from disparate areas of life, engine knock and competition, coalesce and crystallize, essentially becoming embodied in the product. Now, engine knock is a problem of power and prestige.

The idea that advertising might be designed to arouse our insecurities about our lives and ourselves is not new. In 1958, Aldous Huxley wrote in *Brave New World Revisited*:

The principles underlying this kind of propaganda [advertising] are extremely simple. Find some common desire, some widespread unconscious fear or anxiety; think out some way to relate this wish or fear to the product you have to sell; *then build a bridge of verbal or pictorial symbols over which your customer can pass from fact to compensatory dream, and from the dream to the illusion that your product, when purchased, will make the dream come true.*²⁰³

Nowhere does this seem more apparent than in the advertising directed at women. American women are often portrayed in the culture as obsessed with their weight.²⁰⁴ Once again, the question of

200. Jamie Lincoln Kitman, *The Secret History of Lead*, THE NATION, Mar. 20, 2000, at 22.

201. *Id.*

202. *Id.* at 16.

203. HUXLEY, *supra* note 3, at 60 (emphasis added).

204. There is a mountain of evidence on this point, and it would greatly expand this paper to cite more than a fraction of it. Both Lasn and Kilbourne discuss this at length. See LASN, *supra* note 49, at 75 ("Nine out of ten North American women feel bad about some aspect of their bodies, and men are not far behind."); KILBOURNE, *supra* note 47, at 128–154 (Ch. 6, "The More You Subtract the More You Add"); JOAN JACOBS BRUMBERG, *THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS* 97–137 (1997). It has also been extensively covered

whether advertising merely reflects that cultural obsession, or has a role in creating or driving it, is a matter of fierce debate, just as it is with respect to whether violence in media causes children to be more violent, or pornography causes violence against women.²⁰⁵

However, in pondering this question, the following incident is extremely interesting and has been widely reported.²⁰⁶ In Fiji, what would be considered here obesity is very common. "Before television was available, there was little talk of dieting in Fiji. 'You've gained weight' was a traditional compliment and 'going thin' the sign of a problem."²⁰⁷ Just three years after the introduction of television to Fiji, Harvard researcher Dr. Anne Becker noted that the number of teenage girls who had ever vomited to control their weight went from three to fifteen percent.²⁰⁸ The percentage of those who said they had dieted in the past year was sixty-two percent. Apparently, that was a 100 percent increase in the number of those who reported having dieted in the past year. Prior to the introduction of television, Dr. Becker reported that high school age girls in Fiji "[w]ould express curiosity about dieting: What is it about?"²⁰⁹ Not so after the introduction of television. This example is highly suggestive about the power of the media, an integral part of which is advertising.²¹⁰

in other media. See, e.g., Daniel S. Greenberg, *Brazen Anti-Fat Industry Relentlessly Sells the Futile Ethic of Thin*, LOS ANGELES TIMES, Mar. 8, 1989, § 2, at 7 (quoting study finding that high school girls fear obesity and that elementary school children regard obesity as worse than being disabled). Of course, there is some question whether or not obesity is itself a disability and, if so, at what level. Certainly, much of the evidence seems to point to the conclusion that it is profoundly socially disabling.

205. See Campbell, *supra* note 164.

206. See, e.g., Karen Patterson, *Through Thick and Thin; Americans Lose Sense of Proportion in Struggling with Their Weight*, DALLAS MORNING NEWS, Aug. 29, 1999, at 1J.

207. KILBOURNE, *supra* note 47, at 135.

208. See Patterson, *supra* note 206.

209. *Id.*

210. The example also raises questions about just what we are exporting besides our political values. This fear of a cultural export may be part of what is contributing to what the New York Times has reported as an increased hostility toward everything American in Europe—not to mention elsewhere in the world. See Suzanne Daley, *Europe's Dim View of U.S. Is Evolving into Frank Hostility*, N.Y. TIMES, Apr. 9, 2000, at 1, 10. It is worth pointing out that not all media giants are American companies. See BOGART, *supra* note 24, at 49–51 (describing globalization of media giants). However, this merely highlights that the ethos pushed by commercial advertising is not necessarily American but commercial. It is worth considering the degree to which governments exist at the pleasure of these corporate giants and not the other way around. If it were even feasible (given the degree to which politicians are beholden to corporate donors and lobbyists) that the United States were to attempt a major restructuring of media law in a way that posed a serious threat to their interests, to what lengths would the media giants go to protect themselves?

Of course, it would be perverse to inspire fear if you did not also provide the "solution," and Americans have been credited with a particularly strong "can do" attitude.²¹¹ Not surprisingly then, the "solution" that advertisers propose to a myriad of problems is their product. Kilbourne notes that such appeals "connect with the core belief of American culture—that we *can* re-create ourselves, transform ourselves, indeed we should."²¹² By manipulating our fears, advertising tells us that not only is such a personal overhaul possible, but also it is probably necessary, as we probably are not witty enough, powerful enough, sexy enough, or young enough to get what we want.

Advertising "not only promises to palliate all the old unhappiness to which flesh is heir; it creates or exacerbates new forms of unhappiness—personal insecurity, status anxiety, anxiety in parents Advertising institutionalizes envy and its attendant anxieties."²¹³ Having thus stoked consumers' anxieties, advertisers then rush to the rescue to solve the "problem." "[W]e can do it all effortlessly," much advertising seems to say, "if we just use the right products."²¹⁴

F. The "Quick Fix"

If there is any description that best summarizes the junkie mentality, it is the idea of the "quick fix," the notion that a problem or an uncomfortable feeling can be fixed effortlessly. From the heroin subculture, the term "quick fix" has entered general usage to describe the fast, simple solution. The quick fix also appeals to the illusion of control. If a problem is susceptible to being "fixed," then it is under your control. On the other hand, the term "quick fix" carries (or used to carry) a derogatory connotation of a superficial, impermanent, and cosmetic solution—except for marketers.

In marketing, the idea of the "quick fix" is unambiguously positive because promoting ease is an essential part of marketing psychology.²¹⁵ When is the last time you saw a product or service advertised in which the ad suggested the product or service would be hard, difficult, or time consuming to use? Moreover, absurd and catastrophic

211. Roberto Unger and Cornel West call this the "American Religion of Possibility" in their manifesto for reform. ROBERTO MANGABEIRA UNGER & CORNEL WEST, *THE FUTURE OF AMERICAN PROGRESSIVISM* 6–13 (1998).

212. KILBOURNE, *supra* note 47, at 223.

213. LASCH, *supra* note 185, at 73.

214. KILBOURNE, *supra* note 47, at 223.

215. Despite Leo Bogart's conclusion that in advertising there is no winning formula, BOGART, *supra* note 24, at 85, I think conveying the message that something is "simple," "easy," or "quick" comes pretty close. It is difficult to think of any exceptions to this as a positive selling point.

consequences are sometimes suggested as the penalty for failing to use the "simple" solution. For example, in the 1950s, advertising urged adolescent girls to use training bras and girdles in order to ensure the perfection of their ensuing lives. "As adults, they would have good figures and happy futures because they had chosen the correct underwear in their youth."²¹⁶

Advertising promotes and encourages a belief that "life should be easy and painless."²¹⁷ Although, theoretically, all this emphasis on consumption could spur us to work harder so we can afford to consume more, the opposite also seems possible. "Television advertising, with its continual hyped-up breathless euphoria, conveys the impression that life is easy, that good things are coming our way."²¹⁸ Moreover, it presents a picture in which it implies that *everyone else* is enjoying such a life. "Theirs is a world of pure romance and warm fellow-feeling, of strongly knit, secure family relationships, of individuals untroubled except by the fleeting, easily curable distress of bad breath, high cholesterol, or clogged drains."²¹⁹

If this vision of the world is what we think of as normal, then we can become resentful and anxious that our own lives do not seem to mirror that ease.²²⁰ The impression of ease, also arguably "*undermines* the work ethic, the old notions that life is a struggle, that good things must be earned through hard work, and that hard work requires preparation and the learning of skills."²²¹ "We shouldn't have to work too hard at our jobs or relationships. We shouldn't have to struggle to alter our moods or have a good time."²²² But ominously, "*This belief in instant transformation is at the heart of addiction.*"²²³

G. Numbing Down

Another reason for the misconception that "advertising does not affect me" may be advertising's sheer ubiquity. It is literally almost *everywhere*, even in some unusual places like at the bottom of a golf

216. BRUMBERG, *supra* note 204, at 114.

217. KILBOURNE, *supra* note 47, at 223.

218. BOGART, *supra* note 24, at 85.

219. *Id.* at 82.

220. As Professor Robert Nozick has noted, envy is comparative. While it might be a matter of small concern to know that someone somewhere is better off, it is another thing altogether to be confronted with him daily. See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974). Advertising on television, on billboards, and increasingly even in schools confronts daily those less well off with those who are apparently better off.

221. BOGART, *supra* note 24, at 85.

222. KILBOURNE, *supra* note 47, at 223.

223. *Id.*

hole or in displays in public restrooms.²²⁴ One of the consequences of this fact may be that we tune much of it out and are not consciously aware of it anymore—although we may nevertheless be affected. Even if we do not want to buy the product, we may be affected by the level of exposure to the extent that we become numb.²²⁵ Over saturation may render us indifferent to trying to discern the difference between reality and illusion, hype and information.

"Overexposure to manufactured illusions soon destroys their [ads'] representational power. The illusion of reality dissolves, not in a heightened sense of reality as we might expect, but in a remarkable indifference to reality."²²⁶ *"Even a rational understanding of the technique by means of which a given illusion is produced does not necessarily destroy our capacity to experience it as a representation of reality."*²²⁷ This theory of a sort of numbing down to the effects of a barrage of advertising is used to explain why some advertisers have resorted to shock advertising techniques such as Benetton's use of dying AIDS victims and death row inmates.²²⁸ The theory is that ordinary appeals are no longer enough to grab our attention and, therefore, particularly dramatic, shocking, and graphic appeals are needed.²²⁹

H. Consumption: The "Wasting Disease"

In the modern consumer culture, today's satisfaction is placed ahead of delayed gratification. "Why save for tomorrow when you can spend today?" advertising implicitly tells us. Even better, why wait until you have money to spend? Spend tomorrow's money. It is

224. LASN, *supra* note 49, at 19–21. Even more bizarre schemes collected in Lasn's book include ads in people's hair, IBM beaming its logo onto the clouds, and the manufacturer of Skippy peanut butter announcing its plan to stamp its logo on the New Jersey beaches "where it . . . [would] push peanut butter for a few hours before being washed away by the waves." *Id.* at 20–21.

225. The idea that because particular ads lose effectiveness over time means that we are immune to them is debatable. Authors Jonathan Bond and Richard Kirshenbaum have said, "Consumers are like roaches We spray them with marketing, and for a time it works. Then, inevitably, they develop an immunity, a resistance." *Who's Wearing the Trousers?*, *supra* note 174, at 27. I would argue that this phenomenon is more akin to an addict's development of tolerance to the drug so that he has to take larger doses. In any event, the fact that a particular ad does not have the effect that the advertiser would like it to have does not mean that it is not having any effect.

226. LASCH, *supra* note 185, at 87.

227. *Id.*

228. LASN, *supra* note 49, at 22–23. Lasn says that *Advertising Age* columnist Bob Garfield has dubbed such ads "advertrocities." *Id.* at 22.

229. See BOGART, *supra* note 24, at 77 (1995) (attributing the Benetton ads to the advertisers' desire to overcome the "reduction of viewer attentiveness," which he hypothesizes is a reaction to the over saturation of audiences with advertising). If this is right, one shudders to think what will happen when we become inured to *these* ads.

on just such thinking that the vast and powerful credit card industry is built.²³⁰ This is an ideology in which there is little or no market value for long term thinking or planning, whether for savings or for the environment. "The consumer is the one who destroys or expends by use, the one who devours all."²³¹

Of course, this feature of the consumer economy means more needs to be replaced from that devoured today. In modern America, with planned obsolescence and a proliferation of meaningless choices, what seems to result is a sort of circular dynamic. Do consumers consume in order to support producers, or do producers produce so that we may consume to our fill? Either way, it seems "it is a discourse in the service of waste."²³² Yet, despite the cries from others in less privileged positions that we are consuming far more than our share of the earth's limited resources, is not the point of all this consumption that it is supposed to allow us to feel better, to better "realize" ourselves? What would it mean if it does not?

It seems that despite having one of the most affluent cultures in the world, we are not feeling so great. Society is ravaged with violence, sometimes at the hands of children. Depression, addiction, teenage suicide—despite popular belief, it does not get any better at the top. Economist Juliet Schor of Harvard reports that in a survey of "a large telecommunications company, among those who reported dissatisfaction with their incomes, the more they made, the larger their dissatisfaction appeared."²³³ Essentially, according to her study, the more you make, the more dissatisfied you are likely to be.²³⁴ "Plentitude is American culture's perverse burden. Most Americans have everything they could possibly want, and still they don't think it's

230. Significantly, Citibank is now resorting to advertising urging consumers to spend responsibly, to save special expenditures for special occasions. A recently running ad features a man and a woman trying to put more shopping bags into an already overflowing trunk. The caption reads, "Just because you can doesn't mean you should." More text in the lower, left hand corner exhorts the reader to "seek balance and spend wisely." See *PEOPLE MAG.*, Nov. 19, 2001, at 48.

There is a remarkable parallel here to the alcohol industry's similar attempt to adopt a position of corporate responsibility through ads carrying disclaimers to "think before you drink" and to drink responsibly. Given that the credit card industry, just like the alcohol industry, may be heavily dependent upon the supposedly irresponsible user, there is reason to view these appeals with some skepticism, that is, to question whether or not their other advertising efforts effectively neutralize the "responsibility" message.

231. COLLINS & SKOVER, *DEATH OF DISCOURSE*, *supra* note 15, at 92.

232. *Id.* at 93.

233. Juliet Schor, *We Want What We Cannot Afford*, *BOSTON GLOBE*, May 17, 1998, at E1. See also JULIET A. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING AND THE NEW CONSUMER* (1998) (detailing the views in the article, along with supporting data) [hereinafter SCHOR, *THE OVERSPENT AMERICAN*].

234. Schor, *supra* note 233.

nearly enough. *When everything is at hand, nothing is ever hard-won, and when nothing is hard-won, nothing really satisfies.*"²³⁵

The findings of this survey were consistent with other such research by Harvard Business School Professor Susan Fournier and others²³⁶ and led Schor to conclude that increases in income do not correlate to increases in happiness the way it is commonly assumed.²³⁷ Moreover, she attributes this phenomenon to the fact that the benchmarks against which we measure our own lives have shifted from our immediate neighbors, friends, and family, who probably are more or less within the same income bracket as ourselves, to people earning "three, four, or five times" more than ourselves.²³⁸ Settle and Alreck also note this trend in what they characterize as an increased willingness of consumers to splurge, even by consumers "who don't seem to 'know their place.'"²³⁹ It is tempting to consider what role the relentless promotion of credit cards have had, both in this phenomenon and in the surge in bankruptcy filings which prompted the credit card companies to lobby Congress for tightening of the bankruptcy laws.²⁴⁰

Whatever the reasons, it would seem obvious that if our goals for self-realization and happiness are, in economic terms, almost impossibly high and out of reach, we will be unhappier rather than happier for

235. LASN, *supra* note 49, at 11 (emphasis added). Lasn's assertion that most Americans have everything they could possibly want may be overstated. Certainly, it is not overstated when one compares the average American's circumstances to those of persons in many other parts of the world. On the other hand, Americans enjoy a lower quality of life on several fronts, such as health care and job and economic security, than those in many other developed nations with which the United States might reasonably be compared. See, e.g., DEREK BOK, *THE STATE OF THE NATION* 366-89 (1996).

236. Susan Fournier & Michael Guiry, *An Emerald Green Jaguar, a House on Nantucket, and an African Safari: Wish Lists and Consumption Dreams in a Materialist Society*, 20 *ADVANCES IN CONSUMER RES.* 352, 352-58 (1993).

237. SCHOR, *THE OVERSPENT AMERICAN*, *supra* note 233.

238. *Id.*

239. SETTLE & ALRECK, *supra* note 171, at 311.

240. Compare SCHOR, *supra* note 26, at 10-11 (noting rise in bankruptcy rates from 200,000 a year in 1980 to 1.4 million in 1998 with a parallel growth in credit card debt) with Robert Reno, *Health Care, Not Bankruptcy, 'Reform,'* *NEWSDAY*, Apr. 29, 2000 (citing Harvard Professor Elizabeth Warren's bankruptcy study, finding that 40% of personal bankruptcies were related to medical expenditures, not binge spending on credit cards, and calling the proposed reform the "Creditor Relief Act"); Editorial, *Unjust Bankruptcy Reform*, *LOS ANGELES TIMES*, Apr. 26, 2000, at B8 (noting the multi-million dollar lobbying efforts by banks and credit card companies for favor of bankruptcy reform).

Schor argues that survey data reflects that while most credit card holders claim they do not intend to use them, roughly two thirds do and tend to underestimate the amount of debt on their credit cards by a factor of two—a phenomenon economists call "hyperbolic discounting." SCHOR, *supra* note 26, at 20-21. Hyperbolic discounting may be just another term for the optimistic bias and denial. At any rate, credit card companies' lobbying efforts suffered a set back after the events of September 11, 2001 and may be stalled for some time to come if the current perception, that consumer spending needs to be encouraged, continues.

all this.²⁴¹ Thus, it is possible that commercial advertising frustrates the very thing on which one of its claims to protection relies. Far from satisfying us, it virtually guarantees that satisfaction will, at least for many, remain elusive as long as our gaze remains fixed upwards and toward the material at which advertising directs our attention.

I. "Laying Waste Our Powers"²⁴²

Instead of making us more autonomous, there is at least the possibility that advertising leads to our being less autonomous insofar as we unthinkingly follow the patterns of behavior, modes of self-expression and identity,²⁴³ and even rebellion²⁴⁴ defined for us in part by advertisers. Kalle Lasn, media and advertising critic, and founder of *Adbusters* magazine and author of *Culture Jam: The Uncooling of America*TM,²⁴⁵ argues that the level of advertising to which Americans are exposed amounts to indoctrination into a cult.²⁴⁶ "Cult members aren't really citizens. The notions of citizenship and nationhood make

241. It may be that states are stepping into the breach (or is it exacerbating the existing trend?) with the establishment of state run lotteries, a development that is more or less contemporaneous with the development of the commercial speech doctrine. See CHARLES T. CLOTFELTER & PHILLIP J. COOK, *SELLING HOPE* 4 (1998) (locating interest in state-run lotteries as beginning in the late 1960s and early 1970s); see also *Gambling Impact and Behavioral Study*, NAT'L OPINION RES. CENTER U. CHI., (Report to the National Gambling Impact Study Commission), Apr. 1, 1999 [hereinafter *Gambling Impact*].

Lotteries appeal to fantasies of wealth and expectations measured against those in the highest income bracket. Again, debate over the advisability of lotteries often revolves around paternalism or anti-paternalism arguments. CLOTFELTER & COOK, *supra*, at 11. However, this misses a major issue. "The states now offering lotteries do not simply make a product available in order to accommodate the widespread taste for buying a low-priced chance at a big prize. *They seek to foster that taste.*" *Id.* (emphasis added). The issues raised by lotteries, in particular the entanglement of the government with advertising ideology are too complex to adequately cover here, but deserve mention in light of the thesis of this paper and the possibility of addictive behavior associated with gambling.

242. WILLIAM WORDSWORTH, *THE WORLD IS TOO MUCH WITH US*; *LATE AND SOON*, reprinted in WORDSWORTH'S POEMS OF 1807, at 55 (Alun R. Jones ed., 1987).

243. See DOUGLAS KELLNER, *MEDIA CULTURE: CULTURAL STUDIES, IDENTITY AND POLITICS BETWEEN THE MODERN AND THE POSTMODERN* 255-60 (1995).

244. Advertisers for cigarettes and alcohol have long sold the idea that smoking and drinking equal rebellion. See KILBOURNE, *supra* note 47, at 151-215. However, advertisers for other products have also used the imagery of rebellion to sell everything from candy to cars to cosmetics. *Id.* at 292-314.

245. See LASN, *supra* note 49.

246. It is on this ground that the American Psychologists Association is considering censure for members who do consulting work for the manufacturers of children's toys. See "A Trojan Horse for Advertisers", *BUS. WK.*, Apr. 3, 2000, at 10. Professor James Twitchell agrees, referring to modern culture as "Adcult." Unlike Lasn, Twitchell does not think this is necessarily a bad thing. Rather, Twitchell argues that advertising is a location for the creating cultural meaning in which "[y]ou cannot tell the dancer from [the] dance." TWITCHELL, *supra* note 34, at 124. This argument seems to ignore who is paying the piper and in whose economic interest it is that the dance continues.

little sense in this world. We're not fathers and mothers and brothers: we're consumers The only *Life, Freedom, Wonder and Joy* in our lives are the brands on our supermarket shelves."²⁴⁷ "Advertising serves not so much to advertise products as to promote consumption as a way of life."²⁴⁸ Yet, we are not really happy. "Cults," Lasn says, "promise a kind of boundless contentment—punctuated by moments of bliss—but never quite deliver on that promise."²⁴⁹ "Nothing ever satisfies" is a state of mind, like the denial, the numbing, and the quick fix, which parallels that of addiction.

IV. HARMS AND ADVERTISING: THE PARALLEL BETWEEN ADVERTISING AND ADDICTION

"Our whole life and thinking was centered in drugs in one form or another—the getting and using and finding ways and means to get more."²⁵⁰

A. What Is Addiction?

It is very difficult to talk about addiction since there is no aspect of it, its definition, its prevalence, or its treatment, that is not hotly contested. For example, with respect to defining addiction, Dr. Elvin Jellinek²⁵¹ popularized the "disease or medical model" of alcoholism, likening it to diseases such as diabetes.²⁵² According to this model, alcoholism is an insidious, progressive disease with four distinct phases that, if left unchecked, inevitably ends in death.²⁵³ Harvard's Dr. George Vaillant is a proponent of the medical model, but acknowledges that alcoholism's precise etiology is uncertain and, for instance, as with coronary heart disease, may actually be a result of a combination of genetic, social, economic, psychological, and behavioral fac-

247. LASN, *supra* note 49, at 54.

248. LASCH, *supra* note 185, at 72.

249. LASN, *supra* note 49, at 54.

250. NARCOTICS ANONYMOUS 3 (5th ed. 1988).

251. E.M. JELLINEK, *THE DISEASE CONCEPT OF ALCOHOLISM* (1960).

252. The disease model tends to be unitary and dichotomous. That is, one is either an alcoholic or not. Alcohol use does not neatly fall into such either/or categorizations. Also, the disease model focuses heavily on the search for some underlying biological or physiological defect. Although some tantalizingly suggestive data has been offered with respect to heredity as a factor, this search has largely failed to bear fruit with respect to alcoholism. In contrast, lifestyle and social factors play an enormous role in the etiology of alcoholism (although precisely what role no one can seem to say). For a detailed exploration of this topic and related data, see GEORGE VAILLANT, *THE NATURAL HISTORY OF ALCOHOLISM REVISITED* 1–45 (2d ed. 1995).

253. *See id.* at 5.

tors.²⁵⁴ Nevertheless, the disease model gained widespread acceptance in the community and is the prevailing model for alcohol addiction in the medical and treatment community today,²⁵⁵ as well as for many other addictions.

However, the disease model is not a very comfortable intellectual fit for a variety of reasons. Therefore, the disease model has very vocal critics, among whom the most well-known are Dr. Stanton Peele²⁵⁶ and Professor Herbert Fingarette.²⁵⁷ The aspect of the model that seems to most offend these two writers is that it appears to them to deny efficacy and autonomy to its sufferers and to teach sufferers that they are powerless over their own behavior.²⁵⁸ This is an idea Peele and Fingarette find pernicious and offensive because they believe it excuses behavior that ought not to be excused and disables the addict from helping himself.²⁵⁹

Similarly, it is difficult to get a handle on how widespread addiction is: estimates vary widely and are controversial for a number of reasons.²⁶⁰ For one thing, studies tend to be broken down by drug and isolating one substance, for instance, alcohol. Thus, you can find studies on cocaine, alcohol, or marijuana and so forth,²⁶¹ but few looking at several of these substances. So it is difficult to get a reliable number for all substance addictions. This is further complicated by

254. *Id.* at 17–45. See also John Wallace, *Modern Disease Models of Alcoholism and Other Chemical Dependencies: The New Biopsychosocial Models*, 8 *DRUGS & SOC'Y* 69 (1993). For an exploration of the social aspects of alcoholism and how it is defined, see JOSEPH GUSFIELD, *CONTESTED MEANINGS: THE CONSTRUCTION OF ALCOHOL PROBLEMS* (1996). A similar kind of debate emerges in response to the claim that excessive television watching is addictive. Arguably, saying that it is addictive puts the blame on the viewers rather than on the corporate control of the media where it belongs. See Herbert I. Schiller, *Television Is a Social—Not a Biological or Technological—Problem*, 68 *TEX. L. REV.* 1169, 1171 (1990).

255. VAILLANT, *supra* note 252, at 4 (noting that the World Health Organization adopted the disease model in 1973 in response to the numerous professional medical associations that had already done so).

256. PEELE, *supra* note 32.

257. HERBERT FINGARETTE, *HEAVY DRINKING* (1988).

258. See, e.g., PEELE, *supra* note 32, at 27.

259. Dr. Vaillant notes that such positions often tend to reflect “naïve conceptions about the specificity of the term ‘disease’ in medicine.” VAILLANT, *supra* note 252, at 44. Vaillant notes that many other disease definitions like hypertension and coronary heart disease exist on a continuum and are also “intricately woven into the individual’s social life.” *Id.* at 45. Additionally, he disagrees with the idea that the medical model disables the alcoholic from helping himself. Instead, he believes that the release from the shame of a moral stigma makes it more likely that the alcoholic will seek help. *Id.* at 108.

260. See, e.g., Max Singer, *The Vitality of Mythical Numbers*, in *JUDGMENT*, *supra* note 138, at 408 (describing dubious methods used to calculate the number of addicts in New York and their contribution to property crime).

261. See *infra*, note 268.

the artificial dichotomy erected between legal and illegal drugs.²⁶² Furthermore, addictions often overlap. Many people are poly- or cross-addicted.²⁶³ That is, someone who abuses alcohol often has other addictive behaviors such as smoking, drug abuse, compulsive shopping,²⁶⁴ or gambling.²⁶⁵

Perhaps, the most formidable obstacle to calculating the prevalence of addictive behaviors is that people tend to lie²⁶⁶ about them, making self-reporting, one of the common tools for calculating the prevalence of addiction, notoriously unreliable.²⁶⁷ Also, the calculation of the prevalence of addiction in society at large may be premised on counting those in the worst trouble, those arrested, those in detox, and those who self-identify as addicts. To the extent that addiction is dynamic, a process that sometimes (particularly with alcohol) takes time to develop, these calculations may miss vast numbers of those who are behaving addictively but whose addictions have not brought them into contact with the authorities or the medical community.

Finally, if looked at as a whole, and including addictive behaviors not related to a substance, such as gambling, sexual addictions, computer/Internet addictions, and compulsive shopping/buying, it appears that the prevalence of addiction (or addictive behaviors) may be

262. I say "artificial" because alcohol and tobacco cause more loss of life and devastation in lives than all other drugs combined. See, e.g., David H. Jernigan, *The Global Expansion of Alcohol Marketing: Illustrative Case Studies and Recommendations for Action*, 20 J. PUB. HEALTH POL'Y 56, 56 (1999) (noting that globally, instances of disease and injury attributable to alcohol are higher than tobacco and six times higher than illegal drugs). Although I will not address it, there is an argument that illegal drugs are illegal because they are inherently more dangerous.

263. See, e.g., AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 270 (4th ed. 1994) [hereinafter DSM-IV].

264. Although, this is relevant to analyzing advertising, very little information is available to date on it in comparison to substance addictions. The situation is somewhat better with respect to behavioral addictions such as gambling. See, e.g., Sheila B. Blume, *Pathological Gambling: Addiction Without a Drug*, in INTERNATIONAL HANDBOOK OF ADDICTION BEHAVIOR 107 (Ilana Belle Glass ed., 1991). However, compulsive shopping has been studied as if it were an addiction and, as with physiological addictions, a medical solution may be on the way. See, e.g., Krista Conger, *Drug Offers Promising Lead in Treating Compulsive Urge to Shop*, STAN. REP., Dec. 13, 2000, at 13.

265. For an interesting discussion of the growth in this country of legalized gambling, as well as the increase in gambling disorders or compulsive gambling, see CLOTFELTER & COOK, *supra* note 241; *Gambling Impact*, *supra* note 241.

266. Whether they are lying or in denial is a matter of disagreement. However, the problem is that self-reports often are not reliable, regardless of how you characterize the cause of that unreliability.

267. See, e.g., Deborah Brooks Nelson et. al., *The Validity of Self-Reported Opiate and Cocaine Use by Out-of-Treatment Drug Users*, 28 J. DRUG ISSUES 483, 484-85 (1998) (describing the problems inherent in relying on self-reporting for making estimates of prevalence of drug usage, but noting that reliability of self-reporting may vary within discrete groups and depend upon a number of factors.).

frighteningly large by almost any estimation.²⁶⁸ From the external view, addiction is a serious social problem. However, as with the influence of advertising, it is often viewed as a social problem that affects *someone else*.

Moreover, if one looks at the internal view of addiction, that is, at the thought processes characteristic of addiction, they are remarkably similar to those relied upon, stimulated, or encouraged by advertising. This suggests that advertising appeals to and encourages an addictive mindset. As the following account vividly demonstrates, if this is even partially true, it might have serious consequences for our autonomy and our ability to meaningfully participate in our own and others' lives. It may also mean that the belief that advertising does not affect us is one more piece of evidence that we are already hooked.

B. Addiction: The Internal View

Internal descriptions of the experience of addiction compel comparisons to the mind set both to which commercial advertising appeals and to which it may be instilling, whether or not it already existed.

268. For example, the National Institute of Mental Health estimates that one in five Americans suffer from what it identifies as a mental disorder, but does not classify substance abuse among the disorders that it lists. See Nat'l Inst. of Mental Health, *The Numbers Count*, at <http://www.nimh.nih.gov/publicat/numbers.cfm> (updated Jan. 1, 2001). Although substance abuse overlaps with disorders such as suicide, depression, bipolar disorder, anorexia, and obsessive-compulsive disorder, to the extent that there is not perfect correlation, one would expect that adding in substance abuse would increase the number of Americans suffering from a mental disorder.

According to United States Census data, in 1998, slightly over half of Americans over twelve years old reported being a current user of alcohol, 6.2 percent reported being a current user of any illicit drug, and treatment facilities treated 1,038,378 persons for substance abuse in. U.S. Dep't of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK 141 (120th ed. 2000). According to the University of Chicago's National Opinion Research Center, between 2.5 million and fifteen million people may be either experiencing gambling problems or at risk for such problems. *Gambling Impact*, *supra* note 241, at viii. Some estimates of compulsive shopping report that between five and ten percent of the population is affected. IntelliHealth, available at <http://www.intelihealth.com/IH/ih/IH/WSIHWOOO/9103/23809/238352.html?d=dmSimple> (last visited Nov. 27, 2001).

This fragmentation of the study of addictions into separate substances or types of addictions makes it very difficult to estimate what the total magnitude of the problem is. Given that people often under-report these types of behaviors and that treatment centers will only see those who are both badly off and willing to go into treatment, numbers collected from either self-reporting or treatment centers must be assumed to also be artificially low. Finally, this leaves out obesity and eating disorders, which may be related. Yet, if one focuses solely on the number of smokers and considers that most smokers who report that they would like to quit find it too difficult for reasons pointing to addiction, it seems reasonable to consider that as much as a quarter of the country is addicted. The Center for Disease Control estimates that in 1999 there were 46.5 million smokers (or 23.5 percent of the population). See CDC, *Cigarette Smoking Among Adults—United States, 1999*, (Oct. 12, 2001) at http://www.cdc.gov/tobacco/research_data/adults_prev/mnm5040.htm. Since those who are addicted do not live in isolation, everyone must be affected.

These similarities are: "bonding" with the addiction; increasing isolation from others; escapism, fantasy, and magical thinking; decreased capacity to feel or function; and massive amounts of deception of both self and others. Each of these similarities are explored below.

C. Bonding—Addiction as a "Relationship"

Today, "addiction seems to characterize neither a substance nor a personality type, but rather a *form of relationship*."²⁶⁹ In *Drinking: A Love Story*, author Carolyn Knapp describes what she calls her love affair with alcohol. "By the end[, alcohol] was *the single most important relationship in my life*."²⁷⁰ After his introduction to heroin, a heroin addict says, "I found a new friend. It replaced my parents, girlfriends and buddies."²⁷¹ A businessman described cocaine as his lover: "How wonderful was my new chemical lover. She made me feel so, so good, again and again."²⁷² "A friend gave me some speed, and *I fell in love*," writes a person addicted to amphetamines.²⁷³

There are probably many explanations for these descriptions of addiction, some physiological, some psychological, but a common thread that often runs through these stories is a description of necessity, as if the addiction were life itself. At some mysterious level, the addict has associated using with living.²⁷⁴ The bond created is one that seems to promise fulfillment, self-esteem, relaxation, and release of one's "true self." For example, a girl suffering from depression reported, after her first experience with barbiturates, "By the end of that first week I felt good. I felt so happy and carefree. I even liked [myself]!"²⁷⁵

269. Craig Lambert, *Deep Cravings*, HARV. MAG., Mar.-April 2000, at 60. Many researchers deeply object to this characterization. "Addiction is a neurobiological disorder," according to Bertha Madras, a professor of psychobiology in the department of psychiatry at Harvard Medical School. *Id.*

270. CAROLINE KNAPP, *DRINKING: A LOVE STORY* 7 (1996) (emphasis added).

271. *The War is Over*, in NARCOTICS ANONYMOUS, *supra* note 250, at 270 (personal story).

272. *I Felt Hopeless*, in NARCOTICS ANONYMOUS, *supra* note 250, at 236 (personal story).

273. *If I Can Do It, So Can You*, in NARCOTICS ANONYMOUS, *supra* note 250, at 112 (personal story) (emphasis added).

274. JIM HEWITT, *ALCOHOLISM: A MATTER OF CHOICE—A TWENTY-FIRST CENTURY VIEW OF ADDICTION* xxii (1999) ("For the alcoholic, choosing alcohol is felt as choosing life over death."). The author goes on to argue that this felt connection between alcohol and life is obviously mistaken, but it explains why the addiction both is so difficult to overcome and tends to persist despite increasingly negative consequences stemming from it. *Id.* at xxii-vi.

275. "I Qualify," in NARCOTICS ANONYMOUS, *supra* note 250, at 140.

Of course, the tragedy²⁷⁶ is that this connection is hopelessly and horribly mistaken.

Addictions can be described as self-nurturing attachments. They restore image feelings of connection, integration, and freedom where there has been distrust, self-dependence, and painful confusion. *Addictions are self destructive because they are not authentic connections.* They provide substitute image-feelings that are impermanent and transient.

The feeling complex—the most important feature of human life—is centered from birth around bonding. (Note the close similarity between bonding and addiction: addiction is almost a natural state.) Bonding provides the human being with his or her image feelings of connection, integration, and freedom. . . . Addictions may be set up to take the place of authentic bonding. . . . *Addictions are destructive because they permit fantasy bonds; they cannot establish an authentic dialectic in the environment.*²⁷⁷

Interestingly enough, addiction often starts out as a form of real (or authentic) bonding with other people—smoking cigarettes to be in the “cool” group at school,²⁷⁸ happy hour after work with the gang, a little “blow”²⁷⁹ to fit in with the high rollers, some “yak”²⁸⁰ and a “40”²⁸¹ to live the gangsta life. However, if sampling progresses to addiction,²⁸² it involves withdrawal from other people and more bonding to the drug or experience instead of other people.

276. This word is not used loosely. Alcohol, to mention only one addictive substance, is responsible for many annual deaths, although it is difficult to know precisely how many. Short of death, alcoholism is capable of wreaking havoc and destroying lives and often represents (however dimly acknowledged) a form of torture for those caught in its grips.

277. HEWITT, *supra* note 274, at 82–83 (1999). This description sounds uncomfortably close to the bond that advertisers would like us to establish with their products and services. Kilbourne makes a similar point, quoting Barbara Ehrenreich as saying that there is an “element of defiant self-nurturance” in smoking. KILBOURNE, *supra* note 47, at 193.

278. Cigarettes may represent the exception to the model of withdrawal from people. As smoking becomes less socially acceptable, withdrawal into clusters of other users becomes more likely. If there are places you do not go, people you do not hang out with, social or other life experiences that you turn down because you cannot smoke, that is the phenomenon of addiction at work.

279. Slang term for cocaine.

280. Slang term for cognac.

281. Slang term for alcoholic beverages sold in forty-ounce bottles.

282. I am not suggesting that sampling invariably proceeds to addiction (although it does for most smokers). See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 169 (Breyer, J., dissenting) (citing FDA findings that although seventy percent of smokers want to quit, only about three percent of them a year manage to do so).

*D. Beam Me up Scotty!*²⁸³—*Fantasy, Escapism, and Magical Thinking*

Part of what explains the experience of bonding, particularly with drugs, is that, at first, it works. For instance, alcohol initially provides some feeling of release from self. Carolyn Knapp describes it as the "phenomenon of taking psychic flight, ingesting a simple substance and leaving yourself behind."²⁸⁴ Other addicts describe a similar feeling. "We dreamed of finding a magic solution that would solve our ultimate problem—ourselves."²⁸⁵ Moreover, it is quick and easy. A nurse who began her addiction with diet pills explained, "Sure, I knew I could lose weight by watching how much I ate and by doing appropriate exercises, but that meant effort, and I saw no reason to expend effort on something that could be accomplished more easily with the help of a pill."²⁸⁶ Similarly, an attorney recounts, "When stress arose, I would escape with drugs. It was simple, quick, and easy."²⁸⁷

As the addiction progresses, escape from self becomes increasingly necessary. "It became more and more necessary to escape from myself, for the remorse and shame and humiliation when I was sober were almost unbearable."²⁸⁸ A large portion of the shame and humiliation that the active addict feels stems from another facet of active addiction—a lifestyle of deception.

283. A common phrase used among addicts when wanting to acquire drugs is, "Scotty's calling," from the popular television show *Star Trek*. I am indebted to my dear friend Otis A. for sharing this term with me.

284. KNAPP, *supra* note 270, at 60.

285. NARCOTICS ANONYMOUS, *supra* note 250, at 4.

286. TWERSKI, *supra* note 32, at 98.

287. *Id.* at 107. It is worth noting that the author of this story recounts how his drinking and drug use escalated in his first year of law school. This is a frighteningly common response to the pressure of the law school environment. See *Report of the AALS Special Committee on Problems of Substance Abuse*, 44 J. LEGAL EDUC. 35, 45 (1994) ("These data indicate that a substantial number of law students are using various substances as a means for relief of stress or tension, and those law school behavior problems may foreshadow even more significant problems for these people as they face the pressures and tensions of the practice of law."); see also G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among American Lawyers*, 13 INT'L. J.L. & PSYCHIATRY 233, 234 (1990) (finding that levels of depression for entering students in law school about the same, 3%, as in the general population, but that by the end of the first year, the number had increased to 32% and at the end of the third year to 40%).

Based on the empirical evidence, it appears that the fear of what these students will do in practice is well founded. See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1685 (1994) (noting that lawyers experience "more mental health problems, alcohol use, and drug use than the population at large"). This may be true of high stress occupations in general. See, e.g., Sally Gross-Farina, Comment, *Fit for Duty? Cops, Choirpractice, and Another Chance for Healing*, 47 U. MIAMI L. REV. 1079 (1993) (discussing the problem of alcohol and substance abuse among police officers).

288. *Freedom From Bondage*, in NARCOTICS ANONYMOUS, *supra* note 250, at 547 (personal story).

E. Denial and Deception—Ask Me No Questions and I Will Tell You No Lies

Active addiction is a lifestyle that requires a lot of maintenance and a lot of lying:

As my drinking progressed I'd learn to be . . . discreet. So would most alcoholics I know: We hid what we drank, and when we drank it and how much and under what circumstances. We hid it from our friends and families; often, we took pains to hide it from total strangers."²⁸⁹

Hiding your usage from other people is a given if you are using illegal drugs or engaging in illegal activities such as visiting prostitutes. Still, even addictions that involve legal drugs, such as alcohol or addictions to legal gambling generate an elaborate structure of lies. Alcoholics vary liquor stores so that the clerks will not be aware of how much they drink or they might hide bottles in the garbage, refuse to recycle them, or carry them to other people's trash so that all of the bottles would not be in their recycling bin for all to see.²⁹⁰ Gamblers might pad an expense account, borrow on credit cards, or lie to their spouse about the use of funds or time.²⁹¹

According to Knapp, lying is a way of life for alcoholics. "That," she says, "is a statement of fact, not of judgment. Alcoholics lie about big things, and we lie about small things, and we lie to other people, and (above all) we lie to ourselves."²⁹² Lying becomes a way of life for all sorts of reasons: to discourage prying from loved ones, to hide the extent of your drinking/using/behavior from others. Sometimes, it is for completely trivial reasons, such as when a friend of Knapp's said she used to lie about the movies she had seen or the books she had read so that people would think she was more engaged with the world than she was.²⁹³

F. "I Just Want to be Alone"—Isolation and Addiction

Ironically, what often starts out as a bonding experience with other people becomes, for addicts, a process of detaching from other

289. KNAPP, *supra* note 270, at 94.

290. *Id.* at 95. The movie about a female alcoholic, *WHEN A MAN LOVES A WOMAN* (Touchstone Pictures 1994), starring Meg Ryan, involved such a scene where Ryan's character wraps her bottles in a bag before throwing them in the garbage.

291. See Dolores Kong, *Agencies Take to Net to Fight Growth of Computer Gambling*, SUNDAY BOSTON GLOBE, Mar. 26, 2000, at F8 (including the following questions for on-line traders to test if they have a gambling addiction: "Have you ever lied to someone regarding your online trading?" and "Are you becoming secretive about your online trading?").

292. KNAPP, *supra* note 270, at 176.

293. *Id.*

people, not only because addicts have to lie to others and, therefore, regard them as potential adversaries, but because the progress of addiction is a process of detaching from everything not associated with the addiction. "The longer I got loaded, the more it seemed people were getting in my way. After awhile it seemed everybody was against me. I decided people were my problem, and I didn't want anything to do with them."²⁹⁴ A nun described alcohol as her best friend, who helped her cope with loneliness and homesickness.²⁹⁵ However, her best friend "began to take me away from the sisters because she warned me they would not understand. She was right. Slowly the drinking became more and more secretive, and I did it alone."²⁹⁶

Becoming bonded to an addiction means one's life increasingly centers around "getting and using and finding ways and means to get more."²⁹⁷ Of course, a life organized around using and finding ways and means to get more is an obsession that tends to push out other, normal activities. Sometimes the addiction itself is, by definition, a solitary experience, as with computer addictions.²⁹⁸ With illegal drugs, there is a need for concealment because of the illegality. So, interaction tends to become more and more restricted to fellow users although sometimes even fellow users are shunned for fear that they will steal the addict's drugs.²⁹⁹

In addition, some drugs like PCP and cocaine apparently increase paranoia in many users,³⁰⁰ which itself often inspires isolationist behavior. Finally, there is something isolating about obsession, even when in the company of others. "Alcoholics tend to drink alone even when they're drinking with other people. [A]lcohol isolated me from other people, even when I seemed to be smack in the middle of them."³⁰¹

294. *I Found A Home*, in NARCOTICS ANONYMOUS, *supra* note 250, at 129 (personal story).

295. TWERSKI, *supra* note 32, at 127.

296. *Id.*

297. NARCOTICS ANONYMOUS, *supra* note 250, at 3.

298. One may object that someone obsessed with spending time in chat rooms is interacting with people. I would argue that this is not "real" interaction insofar as it is not in person. Although I am not sure how or if I can prove it, I think this makes a difference. Certainly, there is still some interaction just as there is when you make a telephone call. However, with the prevalence of the use of false identities in the chat rooms, see KELLNER, *supra* note 243, at 260, what real interaction there is arguably is even more attenuated.

299. "I got ripped off a few times. I can remember saying, 'Boy are those guys in bad shape when they rip off their friends.' Well, six months later, I started ripping them off." *A Gift Called Life*, in NARCOTICS ANONYMOUS, *supra* note 250, at 107 (personal story).

300. "I started getting paranoid, afraid of being busted or killed. I was afraid to talk to go out in the daytime or to talk to anyone on the phone." *It Won't Get Any Worse*, in NARCOTICS ANONYMOUS, *supra* note 250, at 245 (personal story).

301. KNAPP, *supra* note 270, at 109.

The personal stories of people with addictions are characterized in these recountings over and over again by the same story of alienation, loneliness, and isolation. Interestingly enough, the feeling of isolation, of being different in some way, very often pre-dates the addiction itself. "I escaped reality through books, TV, sleep, etc. I was very much a loner, but only because I thought no one wanted to be around me. *I thought that I wasn't pretty enough, smart enough, rich or popular enough.*"³⁰² Over and over in these stories, addicts report feelings of alienation³⁰³ and loneliness. Not surprisingly, the addict wants to escape from these feelings and using drugs represents an attempt to cope with these feelings—to "solve the problem." Instead, it exacerbates them. In its later stages, addiction no longer produces the positive feelings it once did.³⁰⁴ Now, simple oblivion is often the goal.

G. Numbing Down—Redux

As one addict tells it, "We forgot how to work; we forgot how to play; we forgot how to express ourselves and how to show concern for others. We forgot how to feel."³⁰⁵ The progression of addiction involves behaviors that lower self-esteem, which may never have been very high,³⁰⁶ to even greater depths. "I was miserable, my highs were like lows. I couldn't live with drugs but it was worse without them. I just tried to stay numb or seek oblivion."³⁰⁷ "Life becomes so insular and blank in the last stages of active alcoholism: the drinking at that point is much less a search for pleasure than it is a search for the absence of pain."³⁰⁸ "I'd drink to numb those tears: drown the feelings, keep the sadness at bay."³⁰⁹

Also, active addiction is, as noted above, all-consuming. That is, it takes up much of the energy available for other life activities in the process of using. The diversion of that energy into the maintenance of addiction means that other interests or concerns diminish in importance. Users become numbed to their living circumstances and issues

302. *I Qualify*, in NARCOTICS ANONYMOUS, *supra* note 250, at 140 (personal story).

303. One of the personal stories in *Narcotics Anonymous* is entitled *Alien*. *Id.* at 164 ("I alienated myself from my family. I did not think that I belonged with them anymore than I belonged in this screwed up society.").

304. See, e.g., KNAPP, *supra* note 270, at 62 ("alcohol makes everything better until it makes everything worse").

305. *Id.* at 6.

306. As with loneliness, many addicts report having low self-esteem as a child and/or teenager. See *I Qualify*, in NARCOTICS ANONYMOUS, *supra* note 250 (personal story).

307. *Nowhere to Turn*, in NARCOTICS ANONYMOUS, *supra* note 250, at 186 (personal story).

308. KNAPP, *supra* note 270, at 247.

309. *Id.*

that might be intolerable without the use of drugs.³¹⁰ There is a circular quality to this observation. On the one hand, people often say that they use or are motivated to use drugs because of social or psychological conditions that they find intolerable without the use of drugs, such as poverty, racism, sexism, low self-esteem, and the like. On the other hand, the use of the drugs, and the energy directed at maintaining the illusion of control over using them,³¹¹ often undermines the very things necessary to address or to cope with these problems: energy, connection to others, motivation, anger, self-respect, and so forth.

H. Summary of Parallels Between Addiction and Advertising Psychology

When one sees the prevalence of low self-esteem or self-hatred in the reasons why addicts say they felt they had to use, one has to be concerned about the extent to which advertisers manipulate our anxieties and self esteem in order to sell their products. Certainly, low self-esteem, depression, feeling ill at ease, rebellion, and similar emotions are endemic to the human condition. Everyone feels that way sometimes. Yet, how much does the bombardment of advertising contribute to this feeling? It would be counterintuitive to argue that its contribution is trivial or inconsequential in light of how big a part it plays in our lives.

Similarly, when advertisers sell the "quick fix," they are selling the addict's solution, telling us that our problems can be effortlessly solved by the purchase of a product. The same can be said of escape and fantasy. Indeed, a prominent marketing analyst from the early 1950s, Dr. Ernest Dichter, explicitly identified the interests of a capitalist, consumerist society with consumption and opined that the job of advertisers was to convince the average American that "the hedonistic approach to his life is a moral, not an immoral one."³¹² This is probably a solution with universal appeal. It could certainly explain why we have a sort of love/hate relationship with advertising.

Although there is nothing wrong with fantasy, escapism, or quick solutions per se, given the experiences of the addicts described above, this trio does seem to be a poor set of values around which to organize one's life. It is experience, sometimes hard experience, that hopefully

310. See, e.g., Jernigan, *supra* note 262, at 63 (quoting brewing industry spokeswoman in Estonia blaming Gorbachev's alcohol policies as increasing the level of dissatisfaction in Estonia because without the anesthetizing effects of alcohol "they understood where they were living").

311. See, e.g., Norman E. Zinberg, *Addiction and Ego Function*, in *ESSENTIAL PAPERS ON ADDICTION* 151-54 (Daniel L. Yalisove ed., 1997). See also KNAPP, *supra* note 270, at 152-70 (describing how active addiction often brings the addict's life to a standstill when he uses while waiting for his life to get better rather than doing anything).

312. PACKARD, *supra* note †, at 263 (quoting Ernest Dichter).

teaches us as we mature that there are no "free lunches." Perhaps parents, teachers, and friends have a role in teaching us this as well, but the role that commercial advertising plays is the opposite. Commercial advertising normalizes and endorses the "quick fix." It suggests that "everyone else is doing it so you should too." Ads seem to proclaim: "Look at all these happy, affluent, attractive people enjoying a cigarette, a drink, a Big Mac, a trip to Disney World, the comforts of a Lexus." The inference is, "This could be you if you buy our product!" This message is deceptive because, as noted above, even marketers themselves know that things like relationships, self-esteem, and love cannot be provided by a product. Nevertheless, advertising "pushes what it has to sell, goods and services,"³¹³ as the answer or solution to these desires. In this respect, deception is as integral a part of commercial advertising as it is of addiction.

Focusing on buying your problems off, as opposed to working them out in the world with the help and interaction of others, is at heart the solution to isolation, as are fantasy, escapism, and denial. Moreover, immersion in this advertising culture is alienating and frustrating for those with limited access to consumption power. In a society of widening gaps between those lowest on the scale of purchasing power and those on the highest,³¹⁴ it would seem to be a source of concern that those at the bottom are literally steeped in commercial messages underscoring their plight.

For those at the top of the economic ladder, a life organized around the values promoted by advertising may result in frustration and disappointment as "everything" turns out to be not very much at all.³¹⁵ The emphasis in advertising on escape, easy solutions, and quick fixes undermines the very sort of action that might really help to solve problems of poverty, poor relationships, shyness, and difficulty at work: communication and collective and individual *action*.

Having compared how advertising works with how addiction works, it is time to turn to some societal harms that have been linked to advertising to further study the parallels.

313. See Jhally, *supra* note 186, at 809.

314. See SCHOR, *supra* note 26, at 9.

315. For example, take the 1999 suicide of an *Atlantic Monthly* executive, Kimberly Jensen. Jensen was reported to have achieved everything she could have wanted. Yet, friends were quoted as saying that she was "driven by a thirst for unattainable success." Steven Wilmsen, *Kimberly Jensen's Final, Elusive Journey*, SUNDAY BOSTON GLOBE, Dec. 12, 1999, at E1. In the end, her financial and professional success was not enough to stop her, "aided by alcohol and Benadryl" from putting a bag over her head.

V. COMMERCIAL ADVERTISING AND SOCIAL HARMS

Whatever one thinks of the viability of the theories about the values underpinning First Amendment protection for speech in general, in light of the identification of the various cognitive biases discussed above, there seem to be specific circumstances in which the values typically thought to be protected by the First Amendment come up against competing values of equality or competing definitions of autonomy. There are too many possible cases to discuss at length here, so I limit my discussion to three areas: the advertising of addictive substances, advertising directed at children, and advertising that undermines goals respecting equality for women.

The first area, advertising addictive substances, implicates the "exception" to First Amendment protection for advertising that is misleading, as the bulk of this advertising can be characterized as untruthful and deceptive. Whatever deception is involved here is particularly serious because addictive products carry the risk of physiological as well as psychological attachment.

In the second area, advertising to children, all of the assumptions on which protection for truthful advertising is predicated, no matter how dubious (that the consumer is a mature, rational person who can sort through the "puff" to the substance and is entitled to decide for him- or her-self), disappear. Thus, because the social expectation is that children are highly impressionable and suggestible, it would seem that concerns about indoctrinating children into, for example, bad eating habits, with advertising are far from frivolous.³¹⁶

Lastly, with respect to the societal goal of equality for women, the world reflected back at them in the mirror of advertising is by and large a world in which they have little place except as an object of desire. Advertising magnifies and reinforces this message for women of color. What little power women in general appear to have through their status as objects of desire is, for women of color, undercut by

316. However, the power of those constructs can lead to absurd results such as when columnist Larry Magid urges that teenagers simply need to adopt more skepticism toward advertising. See Larry Magid, *Kids Need to Think Critically to Weed out Unsavory Marketing*, SAN JOSE MERCURY NEWS, Sept. 25, 2000, at 4F. In that article, the author is very disturbed by the fact that his children are the targets of so much marketing, but appears to believe that we are helpless to come up with any better solution than to urge teenagers to act less like teenagers and more like an idealized version of adults.

Similarly, an editorial appeared in the *St. Louis Post-Dispatch*, responding to concerns about the marketing of credit cards to college students. The editorial urged parents to teach their children how to use credit cards responsibly as the cure for the allegation that marketers were preying both on young people's immaturity and on the likelihood that their parents would pay off their mistakes to sell credit cards to young people who were subsequently getting in over their heads in debt. See ST. LOUIS POST-DISPATCH, July 15, 2001, at B2.

their failure to measure up to that standard's almost uniform whiteness.³¹⁷ For women, advertising represents a reminder, more potent and more visible than even pornography, that their professional and educational achievements take second place in the eyes of the market to their value as an object of desire.

A. The Special Case of Addictive Substances

Nowhere is the utter uselessness of the Supreme Court's approval of regulatory authority over advertising's "truth" more apparent than with the alcohol and tobacco industries. Many, if not most, of the ads for these products can be described as deceptive because they characteristically attempt to associate cigarettes and alcohol with freedom, emancipation, companionship, and love when, so often (and in the case of cigarettes, almost always), they lead to the opposite—enslavement to an addiction.³¹⁸ As Jean Kilbourne has pointed out, "This equation between liberation and addiction, between freedom and enslavement to tobacco, is particularly ironic, given that nicotine is the most addictive drug of all . . . and most smokers wish they could quit."³¹⁹

Perhaps more importantly, the tobacco industry, at least, has a poor track record when it comes to disclosure of the health risks of smoking (in other words, truthful information).³²⁰ Cigarette manufacturers have been caught marketing cigarettes to those too young to smoke, those they identify as "pre-smokers." They use advertising campaigns that are appealing to children, such as Joe Camel, as well as ads associating smoking with adulthood, freedom, and rebellion.³²¹

Finally, whatever addictive mindsets may be cultivated by advertising in general, the problem of advertising and promotion is most troubling with respect to products that are themselves addictive, in the sense that they are prone to create physiological habituation. This

317. See, e.g., Deseriee A. Kennedy, *Marketing Good, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 622 (2000) ("The increasing focus on a consumerist response to social issues, although problematic to the greater society, is particularly troubling for groups who are disproportionately affected by these issues: the poor, women, and people of color.").

318. See KILBOURNE, *supra* note 47, at 155–216 (chapters seven and eight, dealing with advertising for alcohol and tobacco respectively and offering many examples).

319. *Id.* at 188. *Adbusters* has developed several "uncommercials" to highlight this dissonance. One is entitled "Joe Chemo" and shows a Joe Camel-like figure in a hospital bed hooked up to an I.V. Another features a sagging Absolut vodka bottle with the banner "Absolut Impotence."

320. See, e.g., Garner & Whitney, *supra* note 45, at 522 (noting that the tobacco industry asserted for decades that nicotine was not addictive and that smoking was not dangerous for one's health, despite general consensus in the medical community to the contrary).

321. See *supra* notes 164–169 and accompanying text.

tendency to habituation or physiological addiction, while not sufficient in itself to create an addiction, certainly appears to increase its probability.³²²

Because of this potential, some commentators are tempted to carve out a special First Amendment exception for addictive products. This is Professor Sylvia Law's position with respect to addictive substances.³²³ Although Professor Law rejects the argument that because commercial advertising is emotive and noninformational it is not entitled to First Amendment protection³²⁴ (because she believes this would result in an overly narrow reading of the First Amendment and would conflict with existing law with respect to puffing), she would apparently carve out an exception for addictive products on the basis of their tendency to make addiction more likely.³²⁵

However, an exception for addictive substances would not necessarily stop at alcohol and nicotine. For instance, caffeine is definitely addictive, and implicating caffeine implicates some big commercial players: the soft drink manufacturers. There is little doubt that caffeine has detrimental effects on the human body (in addition to some beneficial ones, depending upon dosages), and is both physiologically and psychologically addictive.³²⁶ Yet, can we stop there? What do we do about sugar or salt? Now we are treading on shaky ground. That is, these products are less likely to be the subject of a consensus for an exception.

Finally, there are many other drugs being marketed today to address a variety of psychological ills, the addictive potential, not to mention other health risks, of which is inadequately known. Based on the drug companies' historical record, it would not pay to be too sanguine about the likelihood that the addictive potential has been ade-

322. *But see* PEELE, *supra* note 32, at 145–46 (discussing the inadequacy of focusing on the drug or the addict to predict whether or not someone will become addicted.). An exception may be cigarettes, which are considered to be virtually always addicting, particularly for those starting as children. "As many as 90 percent of children who smoke more than two or three cigarettes go on to become regular smokers." Martin J. Jarvis, *Tobacco Smoking: An Everyday Drug Addiction*, in *INTERNATIONAL HANDBOOK*, *supra* note 264, at 97. It is also worth noting that, according to one source, "the two largest advertisers . . . are liquor and cigarettes. They are also the two chief causes of premature death and loss of work. Together they control 65 percent of newspaper space and 22 percent of television time." TWITCHELL, *supra* note 34, at 120 (emphasis added).

323. See Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 *IOWA L. REV.* 909 (1992).

324. *Id.* at 930–33.

325. *Id.* at 945–46. Why create a special niche for addictive products when it is clear that addiction is not driven solely by the physiologically addictive properties of the substance? Might it not be more appropriate to simply reexamine the law respecting "puffery"?

326. See *How Caffeine Works*, at <http://howstuffworks.com/caffeine.htm> (last visited Dec. 21, 2001). See also *DSM-IV*, *supra* note 263, at 177 (Table 1 lists caffeine as a substance that can create intoxication and contribute to sleep and anxiety disorders.).

quately established before these drugs were marketed. "[E]very new pharmaceutical substance that has reduced anxiety or pain or had other major psychoactive effects has been promoted as offering feelings of relief without having addictive effects; and in every case, that promotional claim has proved wrong."³²⁷

With the removal of restraints on direct commercial advertising of prescription drugs, we now face a proliferation of advertisements for drugs like BuSpar and Paxil. An ad for Buspar asks, "Is anxiety overwhelming you? . . . Good thing there's something you can do about it. A medication called BuSpar (buspirone) can help."³²⁸ The copious information provided on the back of the ad lacks all of the emotive appeal of the ad. However, for those tenacious enough to read it, the fine print notes that while "buspirone has shown no potential for abuse or dependence . . . physicians should carefully evaluate patients for a history of drug abuse and follow such patients closely, observing them for signs of buspirone misuse or abuse (e.g. development of tolerance, incrementation of dose, drug-seeking behavior)."³²⁹ What this language represents is unmistakable evidence that the manufacturers do not know what the potential for abuse of buspirone is.

The treatment of a host of mental illnesses with medications that are perhaps inadequately tested is fairly controversial.³³⁰ David Healy, the author of *The Anti-Depressant Era*,³³¹ has claimed that drug companies not only make drugs, but also they make views of illnesses and, hence, markets for those drugs.³³² Now that the pharmaceutical companies are marketing directly to the public, they no longer need to convince doctors of their diagnosis. Instead, all pharmaceutical companies have to do is convince patients, and the patients will come to the doctor asking for the medication. "Children who might be better

327. PEELE, *supra* note 32, at 151. Peele notes that heroin and cocaine are the most well known examples of this phenomenon, but that the same has been found true of "barbiturates, artificially synthesized narcotics (Demerol), tranquilizers (Valium), and on and on . . ." *Id.* So, too, are the new anti-anxiety drugs like Xanax and Ativan.

328. PEOPLE WKLY., Mar. 20, 2000, at 69. An ad for Paxil (paroxetine hydrochloride) appears with the caption, "Has social anxiety put your life on hold?" *Id.* at 91.

329. *Id.* at 70. For a similar statement about Paxil, see also *id.* at 92. Appropriately, the technical information for the BuSpar ad is accompanied by a sidebar advertising the National Anxiety Disorders Screening Day—May 3, 2000. One is invited to visit the website at <http://www.freedomfromfear.org>.

330. See Michelle Cottle, *Selling Shyness*, NEW REPUBLIC, Aug. 2, 1999, at 28.

331. DAVID HEALY, *THE ANTI-DEPRESSANT ERA* (1997).

332. *Id.* at 229–30. To the extent that some in the field consider sugar addictive, much of what was said above with respect to children may be applicable here as well. See, e.g., PEELE, *supra* note 32, at 236 (quoting a study finding a direct, causal relationship between television viewing and obesity in children, "the more TV you watch the fatter you get") (citing W.H. Dietz & S.L. Gortmaker, *Do We Fatten Our Children at the Television Set?*, 75 PEDIATRICS 807 (1985)).

served by therapy are being sent away from their doctors' offices with a prescription for a bottle of pills."³³³ A similar concern exists about prescribing Ritalin and anti-depressants to children.³³⁴ While this latter trend cannot be laid at the door of direct advertising to children, it seems reasonable to ask how big a role marketing to adults has played. More subtle still, what effect does it have on us to believe that all our troubles can be treated with a pill? It looks uncomfortably like laying the foundation for a junkie mentality. However, this is not really a new phenomenon with respect to medicine.

B. History and Drug Companies: Patent Medicine Pushers

Drug manufacturers have not had a good track record with respect to pushing addictive products. Between 1880 and the late 1890s, cocaine and its derivatives were touted as the cure for the morphine addiction problem which appeared to be gripping primarily "the educated and most honored and useful members of society."³³⁵ Then, in 1898, Bayer introduced heroin, again as a cure for other addictions, with the promise that, unlike these others drugs, heroin was not habit forming.³³⁶

All of these drugs—morphine, cocaine, heroin, and alcohol—were sold to the public over the counter in the form of patent medicines that were widely advertised as the cure for virtually anything and everything that ailed one.³³⁷ Manufacturers and advertisers did not, however, disclose the drug content of these concoctions. Furthermore, "the nations newspapers, deeply beholden to the patent medicine industry's copious advertising, displayed no interest at all in enlightening their readers."³³⁸ "To doubly ensure that craven journalistic silence, patent medicine advertising contracts actually stipulated that

333. HEALY, *supra* note 331 at 230.

334. Paul Raeburn, *Turning Our Toddlers Into Guinea Pigs*, BUS. WK., Apr. 3, 2000, at 44.

335. JILL JONNES, HEP-CATS, NARCS AND PIPE DREAMS: A HISTORY OF AMERICA'S ROMANCE WITH ILLEGAL DRUGS 17 (1996) (quoting J.M. Hull of the Iowa Board of Health in 1885).

336. *Id.* at 36.

337. *Id.* at 24–25.

338. *Id.* at 24. The identical phenomenon has been documented with respect to cigarettes. See BOGART, *supra* note 24, at 98–99 (noting that articles on detrimental health effects of smoking rarely appeared in magazines accepting tobacco advertising over seven year period) (citations omitted); KILBOURNE, *supra* note 47, at 52–54. Both because publishers of newspapers and magazines are extremely dependent on advertising revenues and because tobacco companies are the largest of print advertisers, this is not surprising. The only thing that is surprising is that anyone would think it would have been otherwise. As Helen Gurley Brown, publisher of *Cosmopolitan* has said, "Who needs somebody you're paying thousands of dollars a year to come back and bite you on the ankle?" BOGART, *supra* note 24, at 99 (citations omitted).

they would be cancelled if any state law were passed affecting the industry."³³⁹

Finally, a series of exposés did appear in which the amount of drugs in these patent medicines was revealed, and the Pure Food and Drug Act of 1906³⁴⁰ was passed, in part, in response to this information.³⁴¹ However, it was not until 1914 and the passage of the Harrison Acts that patent medicines containing drugs like cocaine and heroin were rendered illegal altogether.³⁴² But, while this Act may have been temporarily efficacious in reducing the usage of these drugs, today it looks about as effective as Prohibition. This history should give one pause in evaluating the claims of the manufacturers of today's "wonder drugs," especially the claim that they are not habit forming.

In short, it seems unwise to rely on the manufacturers of drugs, whether prescription or over the counter, alcohol or tobacco, to provide accurate information on the health risks associated with their products. Historically, these manufacturers have provided accurate information only under the pressure of government regulation. However, regulation mandating disclosure and control may not be enough where the drug pushers, including manufacturers of alcohol and tobacco, are permitted to employ emotionally and cognitively salient advertising that suggests that their products are the solution to life problems such as shyness, dissatisfaction with work, anxiety, the absence of a love interest, fun, or excitement in one's life. Although these products can contribute in some way to a "solution," with the danger of addiction looming in the background, the benefits appear oversold. Even if one concludes that nothing can be done about advertising for addictive products that oversell their benefits when that advertising is directed at adults because we believe adults ought to rationally discount such inflated claims, this argument carries little weight with respect to children.

C. Advertising and Children

Whether or not we think it likely that an open marketplace of ideas is most likely to lead to better choices and wider acceptance of "true" ideas on the part of adults, it seems self-evident that such justifications would not apply to children. Nevertheless, no special advertising limits exist for advertising directed at children, and there is no

339. *Id.* Such a clause could be justified by a perfectly reasonable desire to comply with state law and to cease a futile advertising campaign if, for instance, such drugs could no longer be sold.

340. Ch. 3915, §§ 1-13, 34 Stat. 768 (1906) (repealed 1938).

341. JONNES, *supra* note 335, at 25.

342. JONNES, *supra* note 335, at 40-47.

question that much advertising is directed at children or that children represent an important market for the manufacturers of a number of products and services.³⁴³ With marketing tie-in relationships between movies and fast food, advertising to children is a big business.³⁴⁴

Furthermore, it is not just commercial interests that are directing advertising to children. Those who produce children's entertainment often actively solicit commercial tie-ins that they believe will boost the exposure of their product—the movie, the television series, and so forth. In 2000, McDonald's entered into an agreement with PBS to market a Happy Meal tie-in to its popular show *Teletubbies*.³⁴⁵ In response, a public interest group called Commercial Alert criticized PBS for allowing its vice-president for research to speak at a conference entitled "Targeting Pre-Schoolers and Their Parents" at the Institute for International Marketing.³⁴⁶

If it makes you just a wee bit nervous to think of a bunch of people convened for the specific purpose of trying to figure out how to get you and your children as customers, you should not worry; such meetings are normal. As the chair of *Teletubbies*' U.S. licensor put it, "If you don't realize your child is a consumer by three years old, you don't realize the impact the media are having."³⁴⁷ Apparently the Swedes and the Norwegians do not feel quite so complacent. They have banned all TV advertising aimed at children under twelve years old and are expected to argue that the whole European Community should follow suit.³⁴⁸

Meanwhile, in the United States, according to a recent article in the *Boston Globe*, children spend some \$28 billion a year of their own money and have, marketers estimate, influence over another \$249 billion.³⁴⁹ The article reported studies finding that the average child sees

343. See, e.g., George Will, *The New Adulthood*, TULSA WORLD, Nov. 15, 2001, at A16 ("children spend, or cause to be spent, huge sums").

344. See, e.g., Rick Lyman & Julian E. Barnes, *The Toy Wars for Holiday Movies*, N.Y. TIMES (Nov. 12, 2001) abstract available at <http://query.nytimes.com/search/abstract?res=FB0612F8395C0C718DDDA80994D9404482>.

345. See *A Trojan Horse for Advertisers*, BUS. WK., Apr. 3, 2000, at 10.

346. *Id.*

347. *Id.* (quoting Kenn Viselman, chair of *Teletubbies*' U.S. licensor).

348. *Id.* Such a ban might not have much of an effect on a marketing deal such as this one since PBS is supposed to be commercial free and McDonald's might be able to float ties with just in-store promotion. For additional discussion of the variety of responses in Europe to the problem of advertising directed at children, see Janice H. Kang, *Barbie Banished from the Small Screen: The Proposed European Ban on Children's Television Advertising*, 21 NW. J. INT'L L. & BUS. 543 (2001).

349. Judith Gaines, *Mind Games: Psychologists Debate Ethics of Helping Sell to Children*, BOSTON GLOBE, Mar. 26, 2000, at A1, B4 (quoting JAMES MCNEAL, *THE KIDS MARKET: MYTHS & REALITIES* (1999)).

more than 20,000 commercials per year and that children as young as three years old have brand name and logo recognition.³⁵⁰ Not surprisingly, in light of all this spending, a considerable amount of marketing research money is spent on studying the children's market. For example, marketing researchers have discovered that the area nearest the cash register is the most valuable in terms of attracting kids and inspiring impulse buying by parents because the parents likely already have their wallets out and are "generally eager to dodge scene-causing tantrums"³⁵¹

Obviously, toy manufacturers are among those most interested in selling to children and have taken to hiring psychologists in order to find out how to make toys that appeal to children as well as how to market to them.³⁵² One conclusion the toy industry reached is that they must get them early. To this end, Toys-R-Us offers miniature shopping carts that say "shopper in training."³⁵³ As the former president of Kids-R-Us puts it, "If you *own* this child at an early age, you can own this child for years to come."³⁵⁴ The American Psychological Association (APA) is sufficiently disturbed about this practice that a petition was floated at the annual meeting in 2000 "calling for condemnation of psychologists who assist in marketing and advertising aimed at children, and to amend its ethics code to limit [the practice]."³⁵⁵ As one signatory to the petition put it, "Children are being bombarded by product advertising at an age when they are vulnerable and don't have the cognitive ability to differentiate between fantasy and reality."³⁵⁶

Of course, as discussed above, it is questionable whether even adults have the "cognitive ability" to differentiate between fantasy and reality as far as advertising goes.³⁵⁷ Yet, given that it seems uncontro-

350. *Id.* These figures may be understated. They may not include billboard and print advertising, not to mention advertising that appears in schools on Channel One, BOGART, *supra* note 24, at 73, and in the names of places, such as sports arenas. For example, the former Joe Robbie Stadium in Miami, now bears the name of National Car Rental. It depends upon how the study defined "commercial." The use of the word "commercial" is strongly suggestive of a limitation to broadcast media and video since print advertising is not usually identified as a "commercial," but rather as an "ad."

351. See *TBS II*, *supra* note 141, at 1437 (1999) (citing SELENA S. GUBER & JON BERRY, *MARKETING THROUGH AND TO KIDS* 121 (1993)).

352. Gaines, *supra* note 349.

353. Kalle Lasn, *USA*TM, *ADBUSTERS*, Winter 2000, at 55.

354. *Here's What Some Adults Are Saying Behind Your Back*., *ADBUSTERS*, Winter 2000, at 67 (emphasis added).

355. Gaines, *supra* note 349.

356. *Id.* (citing Susan Linn, associate director at Judge Baker Children's Center in Boston and an instructor at Harvard Medical School).

357. See *supra* notes 125-161 and accompanying text.

versial that children are not "rational" or "autonomous" as those terms are used for purposes of First Amendment theory, theories that rely on these concepts to oppose government regulation of advertising do not offer support for barring regulation of commercial advertising aimed at children. Since many parents feel that advertising has a deleterious effect on children, it is reasonable to ask why the United States has not followed the lead of those countries that have restricted advertising directed at children. One answer is the advertising lobbies have successfully blocked such impulses.

In the late 1970s, the Federal Trade Commission (FTC) began to look at advertising directed at children, particularly on Saturday morning television, and began to contemplate proposing regulations to limit such advertising.³⁵⁸ The response of advertisers was swift and brutal. "With some of Washington's most powerful lobbyists looking on, the Senate Commerce Committee . . . voted overwhelmingly to keep the Federal Trade Commission out of such areas as children's television advertising, used car lots, the insurance industry and consumer products standards."³⁵⁹ This move came two years after Congress failed to vote the FTC a budget.³⁶⁰

Central to this defeat was the FTC's "Kidvid" inquiry, which hypothesized "that all advertising aimed at pre-teens was inherently 'unfair,' because children cannot tell the difference between advertising and programming"³⁶¹ "The Kidvid inquiry was killed by an amendment from consumer subcommittee chairman Wendell Ford (D-Ky.) prohibiting the commission from acting against 'unfair' advertising."³⁶² Instead, the amendment substituted the word 'false,' for 'unfair.'"³⁶³ Then Senator Danforth (R-Mo.), commenting on the Congressional action, said, "I don't want to leave any doubt in anyone's mind—the intent of this action is to kill the Kidvid investigation."³⁶⁴ According to then Senator Packwood (R-Ore.), forcing the FTC "to limit its investigation of advertising directed at children to ads that are 'deceptive' rather than simply misleading" was a result of the "strong influence of the sugar, tobacco and advertising lobbies."³⁶⁵

358. Larry Kramer, *Senate Panel Votes Stiff Curb on FTC Powers*, WASH. POST, Nov. 21, 1979, at A1.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. Merrill Brown, *FTC Temporarily Closed in Budget Dispute*, WASH. POST, May 1, 1980, at B1. Notice that Packwood mentioned the tobacco industry. Did it occur to anyone at

The FTC that emerged from these disputes was a distinctly chastened one for many years thereafter.³⁶⁶

Of course, it is easy to see why advertisers were worried. It is obvious to anyone living in the United States today that a rule banning, or even significantly limiting, advertising directed at children would rather dramatically alter current practices and the commercial advertising landscape. Billions of dollars are spent organizing commercial tie-ins between children's movies and television shows and a slew of commercial products, including fast food, toys, video games, clothing, school supplies, and other items marketed to children.³⁶⁷ Thus, we have fast food tie-ins to *Star Wars Episode I: The Phantom Menace*, *Star Wars* action figures, *Star Wars* lunchboxes and notebooks, and so forth.³⁶⁸ The concept of the commercial tie-in creates self-reinforcing symbiosis. The products inspire interest in the movies, and the movies inspire interest in the products. Pick any recent media phenomenon, and the same sort of symbiosis is evident: *Power Rangers*, *World Wrestling Federation*, *Teenage Mutant Ninja Turtles*, and *Pokémon* to name only a few.

These examples only scratch the surface of the amount of advertising to which children are exposed. In addition to all the ads that children see that are not specifically directed at them in the general environment, as well as those that are on television and so forth, children are exposed to advertising in a concentrated dose where many might least expect it—in school. In high schools around the country, teenagers are treated to a steady stream of commercials on Channel One, the supposedly educational channel.³⁶⁹ The superiority of the ads placed on Channel One compared to those on, for example, network television are obvious because “in-school advertisers” have a captive audience. As Joel Babbitt, former president of Channel One

that time to question what interest the tobacco industry had in the regulation of advertising directed at children?

366. See, e.g., Peter Grier, *FTC Chief Changes Role of “Nation’s Nanny,”* CHRISTIAN SCI. MONITOR, Dec. 6, 1983, at 5 (noting that under a new chief, the FTC has approached its regulatory mission “with less fervor than it used to”; chief Miller quoted as saying he thought he had “turned around” the congressional perception of the FTC “as a bully”). This article notes that some members of Congress did not view the change in the FTC policy as necessarily a good thing. Miller may have been one of the few agency heads who actually pushed Congress “for explicit curbs on his agency’s authority.” Depending on sympathies, this looks like either a remarkable display of duty to the country’s interest against one’s own putative interest, or a cynical manipulation of position to achieve other political ends.

367. Lyman & Barnes, *supra* note 344.

368. *Id.*

369. Allan Casey, *Make Your School an Ad Free Zone*, ADBUSTERS, Winter 2000, at 67.

put it, "The advertisers get a group of kids who cannot go to the bathroom, who cannot change the station, who cannot listen to their mother yell in the background, who cannot be playing Nintendo, who cannot have their headset on."³⁷⁰ Gee! What's not to like?

The in-school ad campaign is not limited to Channel One. Advertisers also sponsor various programs and offer educational games in an effort to do a little stealth marketing. Not surprisingly, schools, which are often chronically starved for funds, are mostly snatching it up. *Adbusters* reports that in Evans, Georgia, a student was suspended from school for wearing a Pepsi® T-shirt to school on Coke® Day, a day so designated in honor of executives flying in from Atlanta for a visit.³⁷¹ If such a move were attempted by the government, it would be labeled suppression of speech. However, Coca-Cola Co. is not the government, so it looks like we cannot expect much help from the First Amendment unless the government abandons its *laissez-faire* attitude with respect to marketing.

Clearly, advertisers think that the elimination of advertising directed at children would have widespread detrimental economic consequences. However, the question is what *social* consequences follow from the *absence* of such a limitation? One consequence that has been suggested is that the unrestrained marketing of sugary, fatty, and salty foods, such as breakfast cereals and fast food, has a negative effect on children's eating habits³⁷² and contributes to childhood obesity and super-obesity.³⁷³ This concern about the tie between children's eating habits and marketing is not limited to advertising directed at children. Ironically, it is precisely the concern with children's eating habits that advertisers have used to sell products to parents, products that not only do not help solve the problem, but that may also perpetuate it.

In *Tylka v. Gerber Products Co.*,³⁷⁴ the plaintiffs alleged that Gerber's advertising was misleading because Gerber claimed that its baby foods were natural and would instill in children a taste for healthy foods, rather than unhealthy ones, when in fact, Gerber baby foods

370. *Here's What Some Adults Are Saying Behind Your Back*, ADBUSTERS, Winter 2000, at 67.

371. Lasn, *supra* note 353.

372. See, e.g., Judy Hevrdejs, *The Plumping of America; Fat Kids: An Unlikely Target of National Concern*, CHI. TRIB., Sept. 17, 1987, § 7, at 1 (quoting experts who attribute the growing level of obesity in children in America to television and recommending parents try to restrict their children's television viewing).

373. This is particularly ironic in light of the culture's preoccupation with thinness. Because of this, there may be a particularly nasty rebound in the incidence of anorexia and bulimia.

374. *Tylka v. Gerber Prods. Co.*, No. 96-C1647, 1999 U.S. Dist. LEXIS 10718, at *18-*19 (N.D. Ill. July 1, 1999), *vacated by Tylka v. Gerber Prods. Co.*, 211 F.3d 445 (7th Cir. 2000).

were high in sugar and filler that arguably would have the opposite effect.³⁷⁵ The advertising claims in the Gerber case seemed designed to prey on parental anxieties about their children and parental concern that their children not have future weight problems. The ads leveraged parents' love for their children to establish trust in the Gerber brand to address these concerns. The testimony shows that Gerber's ads were spectacularly successful.

None of the plaintiffs could remember anything very specific about what Gerber's ads had said, thus undermining their claim to reliance.³⁷⁶ Over and over, they testified that they basically just remembered the name "Gerber" and trusted it.³⁷⁷ One of the plaintiffs went farther, saying that he just had a nonspecific, "warm, fuzzy feeling" from reading the Gerber ad.³⁷⁸ Surely, the Gerber plaintiffs were an advertiser's dream! They came away from the ads with brand name identification, trust, and at least in one case, a "warm fuzzy feeling," but could not remember anything said with enough specificity to say that they had relied on it and thus win a law suit.³⁷⁹ As a result, the plaintiffs lost the case on summary judgment because the district court concluded that Gerber's claims were only puffery and thus could not form the basis of a breach of contract or consumer fraud case.³⁸⁰

Overall, the current environment of unrestrained marketing directed at children is not supported by the arguments supporting freedom of commercial speech for advertising directed at adults. Moreover, advertising seems likely to affect children in ways that we do not yet completely understand. Advertisers believe that they will affect children in one very important way: making them enthusiastic consumers. As Huxley wrote in 1958,

375. *Id.* at *5–*10.

376. *Id.* at *37–*42.

377. *Id.*

378. *Id.* at *40.

379. The case also illustrates another cardinal principle of advertising: if you get the consumers early on, you can generate a ripple effect as one generation often passes on its brand loyalties to the next. One plaintiff testified in deposition that one of the reasons she bought Gerber baby foods was that her mother had used them with her and recommended them. *Id.* at *37. See also BRUMBERG, *supra* note 204, at 33 ("We also know, from reports of market researchers, that when American girls begin to menstruate, their mothers usually introduce them to their favorite brand of sanitary protection and that the girls remain loyal to that brand, generally without much experimentation."). Failure to independently investigate is rational from the perspective that experimentation is not costless. It is time consuming and may result in failure. Thus, if a product appears to be satisfactory, consumers will often choose not to perform independent market research in order to make the most rational decision, where "rational" is defined as completely informed. Rather, they will forgo the possibility that more investigation would reveal a better product to use so long as the product chosen is "good enough."

380. *Tylka*, 1999 U.S. Dist. LEXIS 10718, at *17–*33.

"Think," writes Mr. Clyde Miller ecstatically, "think of what it can mean to your firm in profits if you can condition a million or ten million children, who will grow up into adults trained to buy your product, as soldiers are trained in advance when they hear the trigger words, Forward March!" Yes, just think of it!³⁸¹

Such enthusiastic consumers may be those steeped in the ideology of materialism, consumerism, and individual solutions to most problems, living in a world where "identity [is] fused with commodities."³⁸² It is difficult to see how terribly different (either in ideology or technique) the advertising stew in which children are steeped is from the hypnopædia exercises of *Brave New World*.³⁸³ Like hypnopædia, advertising may be providing the suggestions by which many of the child's future, adult decisions and desires will be guided, however unknowingly.³⁸⁴ Like The Director, in *Brave New World*, advertisers may exclaim in triumph, "[A]ll these suggestions are our suggestions!"³⁸⁵

D. Mirror, Mirror on the Wall, Who's the Fairest of Us All?—Women, Advertising, and the Frustration of the Promise of Equality

One of the most obvious social ills fueled or exacerbated by advertising and media is the objectification of women. Women's bodies are used to sell everything from cars to fishing lures. Of course, they are especially prominent in selling products to women, those pseudo-necessities: cosmetics, designer clothing, hair coloring, and the like.³⁸⁶ Over and over again, women are explicitly and implicitly told that the most important thing about them is how they look. Sure, "you've come a long way baby"³⁸⁷ and now you can do anything you want—work at a "man's job," go to law school, be a doctor, aim high!—but you better look good while you are doing it or you are a failure as a woman.

Despite decades of progress in some areas, women still lag behind men in earnings and are surrounded by a pornography and pros-

381. HUXLEY, *supra* note 3, at 64.

382. See Jhalley, *supra* note 186, at 806.

383. HUXLEY, *supra* note 1, at 25–29.

384. *Id.* at 28–29.

385. *Id.* at 29.

386. This is not a phenomenon of recent vintage. Its roots extend back almost fifty years. In 1957, Vance Packard noted the "triumph of the cosmetics industry in reaching the billion-dollar class by the sale of hope and making women more anxious and critical about their appearance." PACKARD, *supra* note †, at 255.

387. See KILBOURNE, *supra* note 47, at 195–96 (the slogan of the infamous Virginia Slims cigarette advertising campaign).

titution culture³⁸⁸ that undermines their image in society as workers among workers or professionals, or indeed, as human beings rather than as objects. Women are routinely subjected to all manner of assaults to their dignity, from street harassment³⁸⁹ to sexual abuse, from harassment on the job³⁹⁰ to spousal abuse, and from unequal pay to unequal opportunity. Still, women are often deemed important only for their connection to powerful men. Thus, the phrases "arm candy" or "trophy wife" have become prevalent. Is it any wonder, then, that some young girls come to view that selling their bodies, whether in marriage or prostitution (and it is sometimes a challenge to discern the difference), in mainstream movies or porn, in *Glamour* magazine or *Hustler*, as the only way to get ahead in the world? In such a culture, we should not be surprised by "Who Wants to Marry a Millionaire?"³⁹¹

Moreover, many American women, and increasingly women around the world,³⁹² are obsessed with their weight. We do not seem to be any better off for it, either. An item in *Parade Magazine* noted that The American Journal of Public Health reported in a study of 42,000 men and women that women who were clinically fat were 37% more likely to be depressed.³⁹³ "Fat men, however, were 37% less likely to be depressed when compared to men of average weight."³⁹⁴ The article noted that the difference "appears to reflect how we react

388. Open any phone book in almost any major metropolitan area and you will see pages of ads for "escort services," "gentleman's entertainment" (read: nude dancing), and other such indicia of exploitation. If the men in your office go to the local "nude bar" after work, it may feel just a wee bit uncomfortable or strange for you if you are a woman. The message that it sends to women is that women are a commodity to be bought and sold just like any other. This makes it hard to be, or feel, taken seriously.

389. See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993).

390. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). Much of the oppressive material to which Lois Robinson was exposed at work was advertising in the form of promotional calendars by tool manufacturers. *Id.* at 1493-94. Nude calendars for these manufacturers have long been an industry practice, although the sexual harassment law suits might have changed that. Marilyn Monroe's famous nude photo on a rosy bedspread was for such a calendar.

391. See Patrick Schabe, *The Great Whoredom*, Pop Matters, at <http://www.popmatters.com/tv/reviews/w/who-wants-to-marry-a-millionaire.html> (last visited Nov. 18, 2001) (reviewing Fox's *Who Wants to Marry a Millionaire?*, which aired Feb. 16, 2000).

392. See *supra* notes 206-210 and accompanying text (Fiji girls worrying about their weight with the advent of television, despite cultural norms that prefer weightier women).

393. *Obesity is Depressing . . . for Women But Not Men*, PARADE MAG. Mar. 26, 2000, at 16 [hereinafter PARADE]. But see HARRISON POPE ET AL., *THE ADONIS COMPLEX* (2000) (noting a similar preoccupation with body developing in men, with predictable negative consequences).

394. PARADE, *supra* note 393.

to society's view of us. Fat women are not widely regarded as attractive, while fat men don't feel that stigma."³⁹⁵

As with all obsessions, there are consequences. Many women and young girls fall prey to anorexia and bulimia. "Some studies have shown that from 40 to 80 percent of fourth-grade girls are dieting."³⁹⁶ "A 1992 survey of eleven to fifteen-year-old Canadian girls revealed that 50 percent thought they should be thinner. They didn't wish they *were* thinner, they thought they should *be* thinner, as if being thin were a kind of cultural law."³⁹⁷ Of course, in this culture, it is a cultural law, and this is not a cultural message that is limited to women, although, until recently, it has largely been the province of women. According to the evidence, men are increasingly worried about how they look and about their value as objects of desire as well.³⁹⁸ It is a sad and impoverished kind of equality that we seem to be achieving, where women are catching up to men in lung cancer and cirrhosis of the liver and men are catching up to women in preoccupation with their bodies and bulimia and anorexia nervosa.

Finally, as with the other areas discussed, there is some indication that perhaps education is no defense to absorbing this toxic message from advertising. Joan Blumberg, a professor at Cornell, surveyed a number of young women in her classes about their reaction to advertising containing images of women and asked them to analyze some ads. As a result, she found that the young women in her class were "exquisitely sensitive to the cultural pressures surrounding them" and were "adept in their ability to 'deconstruct' the messages about women in any ad"³⁹⁹

Nevertheless, knowledge was not power for these young women. They too, these college students at Cornell, had internalized the commercial messages that surrounded them since childhood and were terribly concerned about their bodies. "Almost all of them admitted that they did battle, *on a daily basis*, with what therapists in the eating disorders world call 'bad body fever,' a continuous internal commentary that constitutes a powerful form of self-punishment."⁴⁰⁰ Is this group just particularly sensitive? That is unlikely in light of the abundant

395. *Id.* Men had their own problems. Men with lower than average body weight were twenty-seven percent more likely to be depressed. "It seems that being a 'portly' man is considered more acceptable than being thin and scrawny." *Id.* This is consistent with the authors' conclusions in POPE ET AL., *supra* note 393.

396. KILBOURNE, *supra* note 47, at 134.

397. LASN, *supra* note 49, at 75 (emphasis added).

398. SUSAN FALUDI, STIFFED 451-574 (1999) (section entitled "Hood Ornaments").

399. BRUMBERG, *supra* note 204, at 196.

400. *Id.* (emphasis added).

evidence that this "body fever" is widely shared, to varying degrees, by American women in every racial and socioeconomic group.⁴⁰¹

CONCLUSION

In the above discussion, I have only scratched the surface of the potentially negative effects of advertising. Not mentioned are the debatable connections between advertising and violence, gun purchases, gambling, environmental degradation,⁴⁰² or loss of community. Moreover, much of what I have said here could also be applied to the entertainment media in general. Certainly, the numbing down, isolation, and fantasy effects are even more prominent there. "America has entered a second adolescence with the following characteristics: grandiosity and a sense of invulnerability, heightened self-absorption, ironic detachment and defensiveness, and a preoccupation with appearance and sex. Media critic Steven Stark adds 'defiant, oppositional anger' to the list. Most of these are characteristics of addiction as well."⁴⁰³ Although, as Kilbourne notes repeatedly in *Deadly Persuasion*, it is difficult to prove, and probably not true, that advertising causes these ills, it surely contributes to them.

Given decades of intense interest by advertisers and marketers in figuring out how our minds work,⁴⁰⁴ and many more decades of bombardment by advertising, it does not seem unreasonable to attribute some of these characteristics to that bombardment. The only way to make a dent in some of these problems is to address them in their formation, so that we can, as the joke goes, figure out what is going on upstream. The First Amendment is the shelter that commercial interests will and do seek in response to such efforts. However, "[t]he truth is that the First Amendment was not meant to protect commer-

401. See, e.g., Kennedy, *supra* note 317, at 622.

402. See, e.g., Jack Gibbons, *The Price is Right?*, in SCHOR, *supra* note 26, at 49–52 (2000) ("[W]e need to recognize we are heading into truly dangerous waters: too many people consuming too many resources on a finite planet.").

403. KILBOURNE, *supra* note 47, at 225.

404. Curiously, we do not view this as research on human subjects. Such research in academia is subject to strict, some say inappropriate, controls pursuant to federal regulation. See Christopher Shea, *Don't Talk To The Humans: the Crackdown on Social Science Research*, LINGUA FRANCA, Sept. 2000, at 27. Why do these controls apparently not apply to marketing research done in the field? "One of the fundamental considerations involved here [in advertising] is the right to manipulate the human personality" when such manipulation would seem to entail "a disrespect for the individual personality." PACKARD, *supra* note †, at 259 (internal quotations omitted). The Packard quote demonstrates that although this ethical question was raised early on, it seems to have been largely forgotten in the ensuing decades.

cial free speech and that commercial free speech today is often the enemy of private speech."⁴⁰⁵

As Calvin Coolidge said, "The business of America is business."⁴⁰⁶ The fact that First Amendment protection was extended to commercial speech not long after Huxley voiced his concern—that his vision in *Brave New World* was coming true even faster than he had thought it would⁴⁰⁷—is one measure of the truth of Coolidge's statement. Today, the business of business is consumption and the manufacture of the desire to consume. It is *a*, if not *the*, central organizing ethos of our society. If America's business is consumption, it may explain why politics so often look irrelevant, as if our elected officials were, like movie sets in old Westerns, false fronts for the crucial business of consumption.

This article suggests that there may be some undesirable consequences flowing from or related to the choice to elevate consumption to our highest duty and to allow largely unrestrained marketing to stimulate that consumption. The "sacred" right of free speech is where property owners today seek to protect the right to manipulate us and distort our values to serve their own ends. These ends are not necessarily society's ends. However, it should be remembered that just as the Realists' insights revealed that the existing distribution of property was not "natural" in the sense that it was not constituted by governmental decisions, so too speech. It is worth considering whether the current architecture of the First Amendment with respect to commercial speech is one we can afford to live with or whether we may not be imperiling our well-being with our complacency.

405. KILBOURNE, *supra* note 47 at 311. Ms. Kilbourne is not a lawyer, so perhaps she does not see the irony in this statement. For purposes of current First Amendment doctrine, commercial speech is private speech, no matter how much it dominates and affects the public discourse. Just another example of the incoherence of the public/private distinction that has been thoroughly criticized so often by so many. This is a point echoed by Professor Twitchell, who also notes that the First Amendment "makes no provision against external corporate forces and certainly not even a hint of protection against internal forces" for censorship. TWITCHELL, *supra* note 34, at 119. In this passage, Professor Twitchell is referring to corporate censorship of content. However, the mirror of this absence of a prohibition on corporate censorship in an environment of corporate domination is the specter of corporate indoctrination. Surely, the First Amendment was not meant to protect someone else's right to abridge our speech?

406. Calvin Coolidge, Address to Society of Newspaper Editors (Jan. 17, 1925), *reprinted in* INTERNATIONAL THESAURUS OF QUOTATIONS 102 (1970).

407. See *Bigelow v. Virginia*, 421 U.S. 809 (1975).